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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LELAND YEE and KEITH JACKSON Defendants.	No.: CR 14-0196 CRB GOVERNMENT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO SUPPRESS WIRETAP EVIDENCE Date: July 7, 2015 Time: 9:30 a.m. Court: Hon. Charles R. Breyer **UNDER SEAL**

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I. INTRODUCTION

Defendants Keith Jackson and Leland Yee have filed motions to suppress certain wiretap evidence obtained in this case on a myriad of grounds. The United States hereby files this consolidated opposition to both motions. For the reasons discussed below, both of the defendants' motions are entirely without merit, and should be denied.

Although the Jackson and Yee cite a number of instances, primarily in the first wiretap affidavit, which they claim are material false statements and omissions, the number pales dramatically in light of the hundreds, if not thousands, of pieces of evidence cited by the affiant agents over the course of the five wiretap affidavits in support of the Title III surveillance in this case. Not only are the alleged misstatements not false or misleading, they are also immaterial in light of the overwhelming amount of evidence supporting probable cause to believe that the defendants and others were engaged in the target offenses. Further, neither defendant has presented evidence showing that any alleged false statements or material omissions were made intentionally or recklessly. Accordingly, neither Jackson nor Yee have met the requisite burden for the evidentiary hearing they demand, and there is no basis to suppress the evidence obtained from the wiretaps.

Similarly, despite Jackson's and Yee's efforts to suggest otherwise, the government demonstrated the requisite necessity for each of the wiretaps. In each of its wiretap affidavits, the government detailed the investigative techniques that had been tried and failed for lengthy period of time, and therefore, why the wiretaps were necessary.

Finally, as discussed below, in monitoring the wiretaps authorized by the Court, the government employed a variety of procedures to avoid listening to calls that were unrelated to the target offenses, while still pursuing the surveillance authorized by the Court. An analysis of how the wiretap monitors undertook their task demonstrates that they acted reasonably and actively engaged in the requisite minimization.

II. FACTUAL BACKGROUND

This case involves a lengthy investigation by the San Francisco office of the Federal Bureau of Investigation into organized crime. The investigation began in approximately 2010, when undercover

FBI employees (herein, UCEs") were introduced to Kwok Cheung Chow, a/k/a "Raymond Chow," a/k/a "Ha Jai," a/k/a "Shrimpboy." Over the course of the investigation, UCEs met with Chow and his associates, and engaged in a wide variety of crimes with them. The offenses included firearms trafficking, drug trafficking, money laundering, trafficking in contraband cigarettes, murder for hire, and public corruption offenses. One of these associates was Keith Jackson, whom UCEs met for the first time on August 5, 2010, at a restaurant in San Francisco with Chow. Gov. Exhibit 1 (Bates US 608080 – US 608085);[1] *see also* Jackson Mot. Exhibit 18 at pg. 17 (Bates US 400287). Jackson subsequently engaged with UCEs to obtain campaign donations for Leland Yee in excess of statutory contribution limits; Yee at the time was running for Mayor of San Francisco. The first solicitation for campaign donations occurred on May 25, 2011. Gov. Exhibit 2 (Bates US 608214 – US 608218)

The investigation continued using traditional investigative techniques for several more months, at which point FBI agents submitted several applications to intercept oral, wire and electronic communications involving Chow, Jackson, and others. The first application, seeking to install a microphone and video camera inside a car driven by Chow's associate George Nieh, was approved by then-Chief Judge James Ware of the Northern District of California on January 17, 2012. Subsequent applications targeted telephones used by Jackson, Leland Yee, and others, and were authorized by this Court. Wiretaps authorized as part of this investigation are summarized in the table below.

Wire	Date approved	Approving judge	Target facilities	Attached as Exhibit?
1	1/17/12	Ware, C.J.	Mercedes Benz bearing license plate 6LRV984 used by George NIEH to drive Kwok Cheung CHOW	No
2	4/13/12	Ware, C.J.	Mercedes Benz bearing license plate 6LRV984 used by George NIEH to drive Kwok Cheung CHOW; Telephone used by George NIEH	No
3	11/13/12	Breyer, J.	Telephone used by Keith JACKSON Telephone used by Leland YEE	Attached to Jackson Mot. as Exhibit 18
4	2/8/13	Breyer, J.	Telephone used by Keith JACKSON	Attached to Jackson Mot. as Exhibit 19
5	4/3/13	Breyer, J.	Telephone used by Keith JACKSON Telephones used by Leland YEE	Attached to Jackson Mot. as Exhibit 20
6	5/9/13	Breyer, J.	Telephone used by Keith JACKSON Telephone used by Leland YEE Telephone used by unindicted co-conspirator	Attached to Jackson Mot. as Exhibit 21

[1] The government's exhibits are filed separately under seal as Exhibits in Support of Consolidated Opposition to Defendants' Motions to Suppress Wiretap Evidence

Wire	Date approved	Approving judge	Target facilities	Attached as Exhibit?
7	7/1/13	Breyer, J.	Telephones used by Leland YEE	Attached to Jackson Mot. as Exhibit 22

In their motions to suppress, Jackson and Yee primarily attack Wire 3 in the table above, but move to suppress subsequent Wires 4 through 7 by extension as well. They do not attack Wires 1 and 2.[2]

III. LEGAL BACKGROUND

Jackson and Yee attack Wire 3 and subsequent Wires 4-7 on four main grounds. First, they allege that the affidavit in of support Wire 3 and the affidavits in support of subsequent Wires 4-7 contained material omissions and misrepresentations, and that the evidence obtained from those wiretaps should therefore be suppressed pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Next, they allege that the Wire 3 affidavit and subsequent affidavits were lacking for both probable cause, *see* 18 U.S.C. § 2518(1)(b), and necessity, *see* 18 U.S.C. § 2518(1)(c). Finally, they allege that the United States did not properly minimize interceptions. *See* 18 U.S.C. § 2518(5). All four arguments are meritless. Before responding to each of these arguments, however, the United States below sets forth the applicable law in each area.

a. Applicable Law Regarding *Franks*

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court considered an attack on the truthfulness of a warrant affidavit. The Court explained that

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

[2] The government anticipates that other defendants will move to suppress Wires 1 and 2. Those motions are due on May 28, 2015. Docket No. 745.

Id. at 171-172.

The Ninth Circuit has established a five-prong test that the defendant must satisfy in order to justify a *Franks* hearing:

> (1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; (5) the challenged statement must be necessary to find probable cause.

United States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (citing *United States v. Dicesare*, 765 F.2d 890, 895 (9th Cir. 1985)); *see United States v. Craighead*, 539 F.3d 1073, 1080 (9th Cir. 2008) ("To justify a hearing, a defendant must make specific allegations, allege a deliberate falsehood or reckless disregard for the truth, and accompany such a claim with a detailed offer of proof."); *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985)(any "false statements must be material to a finding of probable cause"). The defendant bears the burden of proof and must make a "substantial showing" to be entitled to a hearing. *See United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002).

The Supreme Court was careful to limit its decision in *Franks* so that hearings would not become "commonplace;" *Franks* hearings are not "obtainable on a bare allegation of bad faith." *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1982). Instead, "[t]here is, of course, a presumption of validity with respect to the affidavit supporting the . . . warrant." *Franks*, 438 U.S. at 171; *see also United States v. Burnes*, 816 F.2d 1354, 1357 (9th Cir. 1987) ("'In doubtful cases, preference should be given to the validity of the warrant.'") (*quoting United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986)). As noted above, the defendant's attack on the affidavit "must be accompanied by an offer of proof" that includes "[a]ffidavits or sworn or otherwise reliable statements of witnesses." *Franks*, 438 U.S. at 171. In addition, "[a]llegations of negligence or innocent mistake are insufficient," and impeachment of "any nongovernmental informant" is not permitted. *Id.*; *see also id.* n. 8 ("[I]f the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment."); *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978). *Franks* hearings are not permissible "for purposes of discovery or obstruction" but must be reserved for instances where there are serious and documented

concerns regarding the affiant's intentional, and not merely negligent, untruthfulness. *Id.* at 170. The standard of veracity does not require perfect truth "in the sense that every fact recited in the warrant affidavit is necessarily correct" because the affidavit may be "founded on hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165. All that is required is that "the information put forth is believed or appropriately accepted by the affiant as true." *Id.*

Materiality under *Franks* necessarily requires a consideration of probable cause. "[P]robable cause means a 'fair probability' that contraband or evidence is located in a particular place. Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a 'commonsense, practical question.' Neither certainty nor a preponderance of the evidence is required." *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (*quoting Illinois v. Gates*, 462 U.S. 213 (1983) and *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006) (*en banc*)). Because a finding of probable cause is a "commonsense, practical question," the initial "determination should be paid great deference. This deferential approach is the antithesis of a 'grudging or negative attitude' toward search warrants and 'a hypertechnical rather than a commonsense' analysis." *Gourde*, 440 F.3d at 1069 (quoting *United States v. Ventresca*, 380 U.S. 102 (1965)) (additional quotation marks and citations omitted). The initial fact-finder "is permitted to draw reasonable inferences about where evidence is likely to be kept based on the nature of the evidence and the type of offense," *United States v. Terry*, *as amended*, 911 F.2d 272, 275 (9th Cir. 1990), and may also rely on the training and experience of law enforcement officers in interpreting the conduct set forth in the affidavit, *see United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995). As the Ninth Circuit sitting *en banc* colorfully explained, a reviewing court "[is] not in a position to flyspeck the affidavit through *de novo* review." *Gourde*, 440 F.3d at 1069. Rather, a decision that probable cause exists should only be reversed if the decision amounted to clear error. *See Gil*, 58 F.3d at 1418; *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993). "In doubtful cases, the reviewing court should give preference to the validity of the warrant." *United States v. Johns*, 948 F.2d 599, 602 (9th Cir. 1991) (citation omitted).

The same principles and procedures apply when a defendant seeks to challenge a wiretap affidavit. Such a challenge may be based on the issuing judge's finding of necessity as well as probable cause, as necessity is "material to the issuance of a wiretap order." *Ippolito,* 774 F.2d at 1485; *see also United States v. Aviles*, 170 F.3d 863, 866 (9th Cir. 1999). Even if a statement is deemed intentionally or recklessly false, it must still be found "material" to satisfy the *Franks* standard. "False statements are material if the wiretap application purged of the false statements would not support findings of probable cause and necessity." *United States v. Staves*, 383 F.3d 977, 982 (9th Cir. 2004) (internal citations omitted). An omission that is not misleading is not a "false statement" for purposes of *Franks*. *Staves*, 383 F.3d at 982 (citing *United States v. Stanert*, 762 F.2d 775, 781(9th Cir. 1985).

b. Applicable Law Regarding Probable Cause

18 U.S.C. § 2518(3) allows for courts to authorize wiretaps if an applicant shows probable cause that

(a) an individual is committing, has committed, or is about to commit specified offenses;

(b) communications relevant to that offense will be intercepted through the wiretap; and …

(d) the individual who is the focus of the wiretap investigation will use the tapped phone

18 U.S.C. § 2518(3)(a), (b), (d). Courts will uphold a wiretap if, looking only to the four corners of the wiretap application, there is a "substantial basis" for these findings of probable cause. *United States v. Meling*, 47 F.3d 1546, 1552 (9th Cir. 1995)(internal citations omitted); *see also Illinois v. Gates*, 462 U.S. 213, 236 (1983).

c. Applicable Law Regarding Necessity

The "necessity" requirement for a wiretap authorization has two elements: first, the application must include a "full and complete statement" as to whether other investigative techniques have been tried and failed, or why they reasonably appear unlikely to succeed or too dangerous; and second, the government must show that the wiretap was necessary, *i.e.*, that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *See* 18 U.S.C. §§ 2518(1), (3). With regard to necessity, courts review the issuing judge's decision that wiretap interception was necessary "under an abuse of discretion standard." *United States v. Canales-*

Gomez, 358 F.3d 1221, 1225 (9th Cir. 2004).

The necessity requirement is not rigid. The judge authorizing "a wiretap has considerable discretion" with regard to necessity. *United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002). The purpose of the necessity requirement is "to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001). While a wiretap should not normally be the initial step of the investigation, "law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap." *McGuire*, 307 F.3d at 1196-97; *United States v. Smith*, 893 F.2d 1573, 1582 (9th Cir. 1990) (wiretap should not be used routinely as first step, but it need not be last resort); *United States v. Fernandez*, 388 F.3d 1199, 1235-36 (9th Cir. 2004); *see generally United States v. Rivera*, 527 F.3d 891 (9th Cir. 2008). In *Rivera*, the Ninth Circuit held that this common sense approach is used "to evaluate the reasonableness of the government's good faith efforts to use traditional investigative tactics or its decision not forgo such tactics based on the unlikelihood of their success or the probable risk of danger involved with their use." *Rivera*, 527 F.3d at 902 (citation and internal quotations omitted).

Furthermore, necessity must be evaluated in relation to the goals of the overall investigation. "The statute does not mandate the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation becomes redundant or impractical or the subjects may be alerted and the entire investigation aborted by unreasonable insistence upon forlorn hope." *United States v. Baker*, 589 F.2d 1008, 1013 (9th Cir. 1979).

In upholding wiretap necessity, the Ninth Circuit has emphasized that the government is entitled to more leeway in its investigative methods when it pursues a conspiracy. *United States v. Garcia Villalba*, 585 F.3d 1223, 1230 (9th Cir. 2009)(citing *McGuire*, 307 F.3d at 1197-98). In *McGuire*, the Court explained that conspiracies pose "special dangers," since "[u]nlike individual criminal action, which comes to an end upon the capture of the criminal, collective criminal action has a life of its own." *McGuire*, 307 F.3d at 1197. As such, courts have held that if normal investigative means cannot reveal the entire scope of a conspiracy, necessity for wiretapping has been demonstrated. *Id.*; *United States v. Carneiro*, 861 F.2d 1171, 1178 (9th Cir. 1988); *see also Rivera*, 527 F.3d at 902 (stating that necessity

upheld where traditional investigative techniques lead to apprehension and prosecution of main conspirators, but not of "satellite conspirators.") (citation and internal quotations omitted). Even where normal investigative procedures have been successful in developing evidence against some conspiracy members, necessity still exists where the investigation's objective is to discover the full scope of the illegal enterprise. *Canales Gomez*, 358 F.3d at 1226.

In addition, boilerplate conclusions regarding traditional investigative techniques are permitted in wire affidavits. While the panel in *Blackmon* criticized what they called "boilerplate" language, the panel did not hold that this type of language could never be considered, particularly when it was combined with language specific to each individual investigation. The court's concern in *Blackmon* was not that one section of the affidavit lacked particularized facts, but that the affidavit as a whole *only* contained boilerplate language. *See Blackmon*, 273 F.3d at 1210-11. In fact, the Ninth Circuit has expressly held that "[t]he presence of conclusory language in [an] affidavit will not negate a finding of necessity if the affidavit, as a whole, alleges sufficient facts demonstrating necessity." *United States v. Torres*, 908 F.2d 1417, 1423 (9th Cir. 1990).

d. Applicable Law Regarding Minimization

Title III requires that wiretapping or electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter ...." 18 U.S.C. § 2518(5). "Minimization requires that the government adopt reasonable measures to reduce to a practical minimum the interception of conversations unrelated to the criminal activity under investigation while permitting the government to pursue legitimate investigation." *McGuire*, 307 F.3d 1192, 1199 (9th Cir. 2002); *Torres*, 908 F.2d at 1423. The Supreme Court has held that "[t]he statute [authorizing interceptions] does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott v. United States*, 436 U.S. 128, 140 (1978). *Also see, United States v. Turner*, 528 F.2d 143, 156 (9th Cir. 1975)("The statute does not require that all conversations unrelated to the criminal activity specified in the order be free from interception.")

The Ninth Circuit has held that "[t]he minimization techniques used 'do not need to be optimal,

only reasonable ....'" *Rivera*, 527 F.3d at 904, *quoting United States v. McGuire, supra*, at 1202. In *Scott*, the Supreme Court stated that "[b]ecause of the necessarily *ad hoc* nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Scott, supra*, at 139. Instead, the determination whether the agents conducted the surveillance in a manner so as to reasonably minimize listening to calls unrelated to the criminal activity under investigation "will depend on the facts and circumstances of each case." *Id.* at 140. *Also see, McGuire,* 307 F.3d at 1199-1200 (compliance with minimization requirements "requires examination of the monitoring officers' conduct in light of the particular circumstances.")

"The government has the burden to show proper minimization." *Rivera,* 527 F.3d at 904. In addressing generalized attacks on minimization efforts, as opposed to motions to suppress specific conversations because they were not properly minimized, the Ninth Circuit has held that the government need only show "a *prima facie* case of compliance with the minimization requirement." *Id.; Torres,* 908 F.2d at 1423.

In *United States v. Cox*, 462 F.2d 1293, 1299-1302 (9th Cir. 1972), the Ninth Circuit rejected a claim by defendants that the government failed to properly minimize the interception of telephone conversations. In so holding, the Court stated: ""Furthermore, even if the surveillance in this case did reflect a failure to minimize, it would not follow that Congress intended that as a consequence all the evidence obtained should be suppressed." *Id.* at 1301. Referring to the Title III provisions, the Court added: "Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations." *Id.* Thus, while the intercepted conversations beyond the scope of the court's surveillance authorization could be suppressed, those "the warrant contemplated overhearing would be admitted." *Id.* Accordingly, suppression of all wiretap evidence for failure to minimize is far from a foregone conclusion, and the Ninth Circuit cases cited by Yee and Jackson do not hold otherwise. Specifically, *United States v. Scully*, 546 F.2d 255, 262 (9th Cir. 1976), *vacated on other grounds, U.S. v. Cabral*, 430 U.S. 902 (1977), relied upon by Yee, expresses a view of the appropriate remedy. However, that statement was dicta, was not essential to the issue being decided, did nothing to

undermine *Cox*. Similarly, in *United States v. Turner*, 528 F.2d 143, 156 (9th Cir. 1975), cited by Jackson, the Court merely described the different positions of the parties as to the correct remedy. The Court specifically stated that it did not need to reach that issue because it found that the government complied with the minimization requirement. *Id.*

In analyzing the reasonableness of the government's minimization efforts, the courts have focused on the procedures followed by agents monitoring the wiretap. *Scott,* 436 U.S. at 139. *Also see*, *Rivera,* 527 F.3d at 904; *Torres,* 908 F.2d at 1423; *Turner,* 528 F.2d at 157. The courts have found the employment of a variety of procedures and practices sufficient to establish a *prima facie* case of compliance with the minimization requirement. For example, in *Torres, supra*, the Ninth Circuit approved the utilization of the following procedures as supporting a *prima facie* case of proper minimization: (1) monitoring agents were instructed on the requirements and need for minimization; (2) the monitoring agents were also required to read and sign a typed copy of the minimization guidelines; and (3) a DEA agent and an AUSA made themselves available for consultation on a 24-hour basis. *Torres*, 908 F.2d at 1423.

In emphasizing the focus on procedure, the courts have held that reliance on numbers, such as the percentage of conversations determined to be unrelated to the investigation or the number of minimized calls, is of limited usefulness in the minimization analysis. This is largely due to the fact that the appropriate minimization procedures in any given investigation need to be evaluated in light of the specific facts and circumstances of that case. In *Scott*, the Supreme Court upheld a finding of reasonableness of the government's minimization efforts even where the defendant complained that a large percentage of the calls monitored were non-pertinent. The Court stated, "blind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer [about minimization]." *Scott,* 436 U.S. at 140. "Such percentages may provide assistance, but there are surely cases, such as the one at bar, where the percentage of nonpertinent calls is relatively high yet their interception was still reasonable." *Id. Also see, Rivera,* 527 F.3d at 907 (finding that the fact that only 203 of 4,561 intercepted calls were minimized "did not render the DEA's minimization efforts inadequate."); *United States v. Homick*, 964 F.2d 899, 903 (9th Cir. 1992)(noting that where many calls

were brief in duration, the listener frequently cannot determine a particular call's relevance to the investigation before the call is terminated, thus explaining why some non-pertinent calls were not minimized); *Turner,* 528 F.2d at 157 (finding minimization efforts reasonable where monitors minimized approximately one-third of calls longer than one minute).

IV. ARGUMENT

a. The Wire 3 Affidavit Contained No Material Misrepresentations or Omissions

Both Jackson and Yee demand a *Franks* hearing, claiming that there are numerous material misstatements in FBI Special Agent Quinn's November 12, 2012 wiretap affidavit (Wire 3, in the table above at pgs. 1-2, herein referred to as "the Wire 3 affidavit" and attached as Exhibit 18 to Jackson's motion to suppress). A closer look, however, at each of the defendants' purported misstatements reveals that the Wire 3 affidavit was in fact entirely truthful and accurate. Further, even if this Court purged the purported misstatements from the Wire 3 affidavit, which the government by no means concedes is necessary, there would still be ample probable cause and necessity supporting the authorization of a wiretap. Accordingly, defendants have failed to meet the requisite burden for a *Franks* hearing.

Below the government addresses each of the defendants' purported misstatements individually.

1. Purported Misstatement #1: Affiant Reviewed All Recorded Conversations And/Or Reports of Conversations Involving UCE 4773

Jackson identifies 17 purported untruthful statements in the Wire 3 affidavit. Jackson Mot. pgs. 2-8. The first is Special Agent Ethan Quinn's statement in the Wire 3 affidavit that he reviewed all recorded conversations and/or reports of conversations involving UCE 4773. Jackson speculates that it is "doubtful" that Agent Quinn listened to every such conversation. Jackson Mot. at pgs. 2-3. Jackson offers no basis for his speculation, other than his own estimation that there were hundreds of hours of recordings leading up to the application of Wire 3. This purported misstatement, then, is nothing more than a suspicion by Jackson that the FBI may not have conducted proper due diligence before submitting the Wire 3 affidavit.

Jackson further speculates that to the extent that Agent Quinn relied on reports of UCE 4773 in preparing the Wire 3 affidavit, UCE 4773 may have mischaracterized the nature of conversations he had with targets in those reports. Again, JACKSON offers no basis for this speculation, merely his own

suspicions.[3] *See, e.g., United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995)(affiant may rely on the training and experience of fellow law enforcement officers in interpreting conduct set forth in affidavit).

2. Purported Misstatement #2: From September 2011 Onward, UCE 4773 Has Been Solicited by JACKSON and Others to Make Unlawful Payments to Certain Campaigns

Next, Jackson alleges that it was false for Agent Quinn to say that UCE 4773 had been solicited by Jackson and others since September 2011 onward to make unlawful payments to certain campaigns. Jackson alleges that it was UCE 4773 who first suggested the idea of making donations in excess of campaign contribution limits. Jackson Mot. pg. 3. For support, he cites to an excerpt of a transcript, prepared by his defense team, of a telephone call between Jackson and UCE 4773 that took place on September 26, 2011. Jackson Mot. Exhibit 1. Jackson's transcript, however, is selective, inaccurate, and highly misleading. For comparison purposes, the government's draft transcript of the entire telephone call is attached as Government Exhibit 3. But the Court need not resolve any issues of competing transcripts at this time. Rather, the government submits the audio from the telephone call as Government Exhibit 4, so that the Court can hear for itself how, in response to UCE 4773 suggesting that Jackson take a lump sum of $5,000 and break it up into smaller donations, Jackson clearly and audibly replies "we can do that too." Agent Quinn's Wire 3 affidavit accurately reflects Jackson's reply. So does the government's draft transcript. Jackson's purported transcript, in contrast, selectively replaces "we can do that too" with "U/I," or unintelligible. *Compare* Gov. Exhibit 3 and Gov. Exhibit 4 at 04:27 et. seq. *with* Jackson Mot. Exhibit 1.

Government Exhibits 3 and 4 also demonstrate how the September 26, 2011 discussion regarding campaign donations began. Specifically, UCE 4773 told Jackson that he was going to send a donation for $500 in his wife's name but without her knowledge; Jackson then advised UCE 4773 that "they won't call her" if UCE 4773 wrote his wife's occupation on the check. Gov. Exhibit 3 at pg. 2. In other words, from the very inception of the discussion about campaign donations in September of 2011, UCE 4773 and Jackson were discussing making unlawful payments to Yee.

[3] The Court will recall that this is not the first time that defendant JACKSON has attacked UCE 4773's credibility. Thus far, this Court has not entertained such attacks. *See* Transcript of October 10, 2014 Hearing at pgs. 7-27.

Moreover, Agent Quinn's Wire 3 affidavit describes how, just a few minutes after the September 26, 2011 call with Jackson ended, UCE 4773 received a call from Yee, addressing future meetings to raise money. Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 21 lines 6-7. Thus began the long relationship between Jackson, Senator Yee, and UCE 4773, with Jackson and Senator Yee continually soliciting UCE 4773 for campaign donations, and UCE 4773 asking for official actions in return. *See, e.g.*, Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 21, lines 16-19 (describing how on September 30, 2011, YEE told UCE 4773 that if one donor gave in their own name and their spouse's name, then "one donor literally can give $1,000"); Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 21-22 (noting additional requests for campaign funds from Jackson in October of 2011). It should also be noted that that it was Jackson who first suggested to undercover agents the idea of giving $5,000 as a lump sum and then putting it into different accounts, back on May 25, 2011. Gov. Exhibit 2. Wire 3 Affidavit (Jackson Mot. Exh. 18, at 18). Granted, that discussion was between Jackson and another undercover agent, UCE 4599, not UCE 4773. But, to the extent that Jackson is contesting the suggestion in the Wire 3 affidavit that he did not initiate the idea of breaking up campaign donations, Jackson is clearly wrong.

Jackson also claims that the Wire 3 affidavit omits any reference in the September 26, 2011, call to Jackson encouraging UCE 4773 to make his wife's donation by credit card. Jackson apparently overlooked the following statement in the Wire 3 affidavit: "UCE 4773 and JACKSON briefly spoke about UCE 4773's wife's contribution using her credit card." Wire 3 affidavit (Jackson Mot. Exhibit 18) at pgs. 21, lines 2-3. In short, there was no omission.

3. Purported Misstatement #3: Companies Associated with UCE 4773

Jackson takes issue with Agent Quinn's characterization in the Wire 3 affidavit that there were multiple *companies* with which UCE 4773 wanted YEE's official assistance. According to JACKSON, there was only one company. Jackson Mot. pg. 3. At best, this argument presents an issue of semantics, not untruthfulness. In any event, Jackson is wrong. As explained elsewhere in the Wire 3 affidavit, "[t]o both JACKSON and Senator YEE, UCE 4773 presented himself as a businessman based in Georgia who represents clients who are interested in business and investment opportunities in California

generally, and the San Francisco Bay area in particular. In essence, UCE 4773 represented himself as a go-between for people with money and people in San Francisco or California who might be able to offer investment opportunities." Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 19. Elsewhere in the Wire 3 affidavit, Agent Quinn explains how UCE 4773 portrayed himself as having an interest in companies involved in, among other things, affordable housing, senior-assisted living facilities, and technology consulting. Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 38, lines 24-28. Thus, there was nothing inaccurate about the use of the plural word *companies*.

4. Purported Misstatement #4: Agreement to Provide Campaign Contributions In Exchange For Local/Minority-Owned Business Status

Jackson takes issue with Agent Quinn's statement in the Wire 3 affidavit that there was an arrangement between Jackson, other interceptees, and UCE 4773, whereby UCE 4773's companies would receive favorable treatment as local or minority-owned businesses, in exchange for campaign payments. Jackson says that there is no evidence this arrangement existed. Jackson Mot. pg. 4. Jackson overlooks, however, a conversation between an interceptee and UCE 4773 on May 7, 2012. *See* Wire 3 affidavit (Jackson Mot. Exhibit 18) pg. 42, lines 4-7. In that conversation, the interceptee indicated that she had received a $5,000 check for a political candidate that UCE 4773 had mailed earlier. In the same conversation, the interceptee indicated that she was checking on possible business for UCE 4773, and could do a certification for a local office right away. Jackson also overlooks a March 1, 2012 conversation, in which another interceptee told UCE 4773 that she wanted a $10,000 commitment from UCE 4773 for a political candidate. The interceptee further stated "You pay to play here. We got it. We know this. We are the best at this game; uh, better than New York. We do it a little more sophisticated than New Yorkers. We do it without the mafia." Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 32, lines 16-18.

5. Purported Misstatement #5: UCE 4599 Representing Himself as a Marijuana Trafficker, a Money Launderer, and a Member of La Cosa Nostra

Jackson alleges it was a misrepresentation to say that UCE 4599 portrayed himself to Jackson as a marijuana trafficker, a money launderer, and an east coast member of La Cosa Nostra, an organized

crime group. Jackson's chief complaint appears to be that UCE 4599 never used the phrases "La Cosa Nostra," "mafia," or "trafficker" with Jackson. Jackson Mot. pg. 4. This argument is obtuse. Common sense would suggest that real members of shadowy criminal groups ordinarily would not use the phrases "La Cosa Nostra," "mafia," or "trafficker" in their conversations with conspirators; they would be far more discreet and careful than that. UCE 4599 may have avoided using language overtly linking himself to organized crime in order to enhance the credibility of his story that he was mafia-connected. However, he still made his character's cover story abundantly clear to Jackson throughout the course of their relationship. For example, during a May 30, 2012, lunch meeting at a restaurant, Jackson was present at the table while UCE 4599 and UCE 4773 discussed their investment in an illegal marijuana grow in Mendocino County. They also discussed using a nightclub/bar in Atlanta to launder UCE 4599's illegal money. *See* Gov. Exhibit 5.[4] During a September 20, 2012, meeting, Jackson, co-defendant Brandon Jackson, and co-defendant Marlon Sullivan solicited UCE 4599 for narcotics business opportunities precisely because of who UCE 4599 had represented himself to be. During that meeting, UCE 4599 continued to present himself as a person with a powerful and connected "family" who could assist them in their efforts to traffic in narcotics. UCE 4599 was also known to them to have become affiliated with defendant Chow's organization. There could have been no remaining question at the conclusion of that meeting as to the illegal nature of UCE 4599's cover story for defendant Jackson. *See* Gov. Exhibit 6.

6. Purported Misstatement #6: Jackson's Statement to UCE 4599 that a $5,000 Donation Could Be Placed in Different Accounts Under Multiple Names at a Rate of $500 Each

Jackson takes issue with Agent Quinn's statement in the Wire 3 affidavit that on May 25, 2011, Jackson told UCE 4599 that if UCE 4599 wanted to contribute $5,000 to Yee, the money could be placed in different accounts under multiple names at a rate of $500 each. Jackson says this statement does not exist anywhere in the discovery. Jackson Mot. pg. 4. It does. *See* Gov. Exhibit 2 (Bates US

[4] In the course of reviewing its files while preparing this motion, the government has been unable to locate Bates-stamped versions of Government Exhibits 5 and 6. In the event that they were not turned over previously, the Government produces them here without Bates stamp numbers, and will produced Bates-stamped copies to all defendants through the discovery coordinator.

608218).

7. Purported Misstatement #7: Jackson Asked UCE 4599 To Contribute $3,000

Next, Jackson takes issue with Agent Quinn's statement in the Wire 3 affidavit that on June 24, 2011, Jackson asked UCE 4599 to "contribute" $3,000. Jackson contends that he actually asked whether UCE 4599 could "raise" $3,000. The difference is trivial, in light of the above-described discussion on May 25, 2011. Specifically, whether "raising" or "contributing," Jackson had already made it abundantly clear to UCE 4599 that if one person wanted to make a lump sum donation over $500, he could do so by using multiple accounts.

8. Purported Misstatement #8: Sometime Before September 20, 2011, UCE 4599 Told Jackson that UCE 4773 Was a Businessman Who Assisted in Laundering Money

Defendant Jackson claims that the following statement is false: "On September 21, 2011, UCE 4599 arranged a telephonic meeting between JACKSON who used Target Telephone 1 and UCE 4773, who was posing as UCE 4599's businessman friend from the East Coast. Sometime before this call, UCE 4599 told JACKSON that his friend was a businessman who assisted UCE 4599 in laundering money." Defendant Jackson claims this is false. Although UCE 4599 may not have overtly used the phrase "laundering money," it would have been clear to defendant Jackson from UCE 4599's "legend" what he meant in the following conversation on September 13, 2011:

KJ: So the race is between Ed Lee and my guy, Leland Yee.

UCE-4599: Okay

KJ: And, uh, it's gonna be, it's gonna be a interestin race.

UCE-4599: Yeah.

KJ: But for us to get to the finish line, we need to bring in, I need to bring in some more money.

UCE-4599: Well, you know, uh, alright, yeah timing's good, you know, uh, I'm gonna be out, I'm gonna be out next week, and actually, one of the guys my family does business with, uh, his name's Mikey. Or, uh, I call him, I call him Mikey, but he's, his real name is Michael [redacted] He's uh, he's a really, really good guy. He's a heavy hitter from the Atlanta area.

KJ: Okay

UCE-4599: I think he's, you know, I think he's definitely somebody you should know because he's uh, he's gonna start up, he's lookin at starting up some business in and around this area. Everything he does, I mean, he's **he's done a lot of work with us and he's helped my family out a lot**. Uh, but he's uh, **he's got his own thing going on** and uh, I think it's worth meeting. Uh, you know, he's definitely

worth meeting. If he's gonna be, he's actually in town for some business so I figured, let's tie it together because I, I had mentioned uh, him to you, a couple months back and uh, it's just, it's kinda working, out that way if you're alright with it?

KJ: No that's uh, I'm cool, that's perfect.

UCE-4599: Yeah

KJ: that's perfect

UCE-4599: Yeah

KJ: I really, yeah cause I really wanted to sit down with you and just kind of like, just go over some stuff, some scenarios …

UCE-4599: Yeah

KJ: to see how we can

UCE-4599: Yeah

KJ: how we can work this thing

UCE-4599: Yeah

KJ: work for, for Leland because he's got a good chance, even if, and Dave, at the end of the day if he does not win the mayor's seat, he still got three years in the State Senate.

UCE-4599: Yeah

KJ: so, uh, you know, so I mean the guy he's

UCE-4599: Yeah

KJ: he's a good guy.

UCE-4599: yup

KJ: you know, uh, you know, and uh, Raymond, Raymond is totally, totally on board with him.

UCE-4599: alright, yeah, I better, I gotta give, give those guys a call and you know, uh, I, I wanna make sure that, you know, hey look, I, I wanna be a man of my word you know, and I want to help you out and so when I see you, I'll definitely help you out, but uh, I think you know, uh, I think you'll be interested in, you know, in seeing uh, uh, you know, Michael, seeing what uh

KJ: okay,

UCE-4599: you know, what he uh, Mike's a great guy, I think you guys should definitely at least, minimally, talk, trade emails, but I think he's, he's wantin to do a lot of business out here and

KJ: Okay

UCE-4599: **he, uh, he knows the deal** and you know, as far as I'm concerned you know Keith, you know, I, you know, I you know, **I wanna help out and you know, and uh, but there's only certain ways that I can do it**, you know, there's only so

KJ: yeah, exactly. Yeah, I know, I understand, I understand.

UCE-4599: But we'll, we'll make it work for us. You know what I'm saying, so?

KJ: Okay

Gov. Ex. 31(emphasis added). Given what defendant Jackson knew about UCE 4599 and his "family," these statements regarding (1) UCE 4773 doing work with the family, (2) helping the family out a lot, (3) knowing the "deal," and (4) being part of the "certain ways" that UCE 4599 could help out were clear statements to defendant Jackson that UCE 4773 was criminally involved with UCE 4599's money and would be the manner through which UCE 4599 could help defendants Yee and Jackson obtain money.

Therefore, the affidavit was accurate. Certainly, it was not intentionally misleading. Nor would that statement, if erroneous, be material to the probable cause in the Wire 3 affidavit given the blatant criminality of the conversations between defendant Jackson and the UCEs regarding defendant Yee being available to assist for the right price.

9. Purported Misstatement #9: Jackson tells UCE 4773 That He Broke Up a $5,000 Donation Among Straw Donors

Jackson takes issue with Agent Quinn's statement in the Wire 3 affidavit that in a conversation subsequent to October 11, 2011, Jackson told UCE 4773 that he broke up a $5,000 donation from UCE 4773 to Yee among straw donors in order to make conduit contributions. Specifically, Jackson questions whether this conversation ever occurred. It did. Gov. Exhibit 7 (Bates US 607266 – Bates US US 607268). Jackson also claims that the $5,000 was not a contribution to YEE, but a payment to Jackson for consulting services. This is incorrect. Discovery materials plainly show that on October 11, 2011, UCE 4773 wrote a check to JACKSON for the purposes of donating it to YEE's campaign. Gov. Exhibit 7 (Bates US 607266).

10. Purported Misstatement #10: By October 14, 2011, UCE 4773 Had Contributed $11,000

to Senator Yee's Campaign

Jackson alleges that the Wire 3 affidavit erroneously refers to money raised by UCE 4773 by October 14, 2011, as contributions from UCE 4773. As Jackson then goes on to admit, however, the Wire 3 affidavit makes painstakingly clear to the reader the source of every bit of money contributed and raised by UCE 4773 for Yee. Whether the Wire 3 affidavit makes reference to UCE 4773 having "contributed" – and there were $11,000 of contributions delivered to Jackson and Yee by UCE 4773 at that point – or as "delivering contributions" is immaterial and not misleading when the entirety of the Wire 3 affidavit described each of the various contributions and the sources of money for the contributions that were provided to defendants by UCE 4773. Jackson admits as much in his Exhibit A at 1: "[t]he affidavit makes clear that by that date, UCE 4773 donated $500 from himself, arranged for his wife to donate $500, arranged for 10 undercover agents to donate $500, and written a check to Keith Jackson for consulting fees for $5,000." Jackson Mot. Exhibit A, pg. 1. If the Wire 3 affidavit described this to the Court - and it did - it is difficult, if not impossible, to understand how Jackson can simultaneously claim that that the Wire 3 affidavit misled the Court. Notably, even the $5,000 check written to "Jackson Consultancy" was not really "for consulting fees." As described in the Wire 3 affidavit, that check was not actually for any consulting by Jackson but was designed to be converted by defendant Jackson into money for defendant Yee's campaign in the form of a disguised bribe. Wire 3 affidavit (Jackson Mot. Exhibit 18) pg. 21 line 28 – pg. 22 line 11.

11. Purported Misstatement #11: Senator YEE Acknowledges UCE 4773's Statement That It's too Much Money Not To Get Something Back

Jackson alleges that in the Wire 3 affidavit Agent Quinn Affidavit misrepresented defendant Yee's conversation with UCE 4773 on October 14, 2011. Again, Jackson is mistaken. Even more troubling, though, is that this allegation on Jackson's part misleads the Court. Jackson states:

> Agent Quinn quotes UCE-4773 as describing his donations as 'too much money . . . not to get something' and then alleges that Senator Yee acknowledged that statement. US400293. This is false. Senator Yee did not acknowledge that a donation was too much money not to get something in return.

Jackson Mot. at 6. What actually occurred was the following conversation, at approximately 6:18 into the conversation (emphasis added):

> UCE 4773: It's too much money . . .
>
> LY: **Right.**
>
> UCE 4773: . . . not to get something back.
>
> LY: **Right, right.**

Gov. Exhibit 8 (draft transcript of meeting); Gov. Exhibit 9 at 06:00 – 06:30 (audio recording of meeting). It is concerning that, given this conversation, Jackson represents in his motion and in a declaration to this Court that Yee did **not** acknowledge the statement by UCE 4773. Jackson's transcript of the portion of this conversation simply ignores the statements by Yee during that conversation as if they did not occur. Jackson Mot. Exh. 8. In his transcript, Jackson claims that the uninterrupted statement by UCE 4773 consists of ". . . I understand I can't put you in that position where I need to ask for something in return, but that's it's too much money and not get something back. I want you to win, . . ." Jackson's inaccurate transcript completely ignores the responses by Yee. That Yee's actual response to the portion quoted in the Wire 3 affidavit is "Right. . . . Right," interspersed with the statement by UCE 4773, is Yee's unequivocal acknowledgement of UCE 4773's statement that "it's too much money not to get something back."

12. Purported Misstatement #12: Throughout the Remainder of the 2011 Mayoral Campaign Jackson and [redacted] asked 4773 for additional contributions

Jackson contests the truthfulness of the statement in the Wire 3 affidavit that "[t]hroughout the remainder of the 2011 Mayoral campaign JACKSON and [redacted] contacted UCE 4773 via telephone to ask for additional contributions beyond the campaign finance limit." Jackson's claim that this statement is false is unsupported. Agent Quinn's Wire 3 affidavit describes in great detail the requests made to UCE 4773 for additional contributions during October of 2011. Wire 3 affidavit (Jackson Mot. Exhibit 18) at pgs. 21-24. Furthermore, on November 3, 2011, [redacted] solicited UCE 4773 to contribute. The conversation, a draft transcript of which is attached as Government Exhibit 10, was as follows:

UCE 4773: What can I do for you [redacted]?

[redacted]: So I was wondering if you could possibly raise us any (UI) dollars?

UCE 4773: You know, in all my efforts got tapped out in that first, um, that first, . . .

[redacted]: That first bundle?

UCE 4773: (UI), yeah, and um, I think what I wanna do and, (UI) pass this on to the Senator for me is, um, and, you know I'm hoping that it does pan out obviously but um, you know after the election we can uh sit down and, uh and get some things done. I know that doesn't help you out but uh, it's (UI)

[redacted]: Oh no, that's fine.

UCE 4773: Is that good?

[redacted]: No, but let's, let's touch base afterwards.

UCE 4773: (UI) I'll . . . okay. Where, where are you on your fundraising goals?

[redacted]: Good, I mean uh, it'd be great if we could get another ten thousand, um, but yeah, we're good, it's just, we need another ten, you know.

UCE 4773: Okay.

[redacted]: I mean, if we can get another ten afterwards, that's good as well, but, . . .

UCE 4773: Okay, all right, and if,

[redacted] I don't know if you're a, able to like, I mean make any commitment afterwards.

UCE 4773: Um, yeah, well, we can, um, you know, they'll be uh a couple conversations that we'll have to have cause it's so much money for me, for me to part with, and I'll be back that way uh, I think week after next, but right around the week of Thanksgiving or the week after, something like that, so, um, if you, you know right after um he wins the election, so um, can we talk then?

[redacted]: Yeah, absolutely.

Gov. Exhibit 10. Thus, [redacted], on behalf of defendant Yee, was soliciting UCE 4773 for additional money during the period indicated.

Similarly, on November 5, 2011, defendant Jackson called UCE 4773 and stated that defendant Yee had been trying to reach UCE 4773: "I know the Senator's trying to call you, you ever talk to him?" Jackson stated that he would talk to Yee and have Yee call UCE 4773. They discussed Yee's prospects in the upcoming election:

UCE 4773: Well I got my fingers crossed, I mean,

Jackson: Man, who you telling. (Laughs) Who you telling, shit!

UCE 4773: My investment is not as big as yours.

Jackson: Yeah

UCE 4773: Yeah.

Jackson: Man hey, every dollar counts and what you did was big too, so, and he's, he's grateful for that, uh, but we, you know, we got, we gotta make this thing happen man.

UCE 4773: Okay, uh give me a call.

Jackson: But the good, but the good thing about it is, if not we still, we got access in Sacramento and uh, and I think the next time you come out, you and I should probably take a trip up there and meet the chief of staff, meet, I want you to meet all the staff people, uh,

UCE 4773: Okay, cool.

Jackson: That way you, you have, you know, when you want to get things done, you know exactly who to talk to.

Gov. Exhibit 11.

13. Purported Misstatement #13: The January 18, 2012 Conversation

Jackson alleges that in the Wire 3 Affidavit, Agent Quinn mischaracterized the January 18, 2012 conversation that took place between Yee, [redacted] and UCE 4773. He asserts that the affidavit omits critical statements that contradict "the false narrative" that Agent Quinn presents. For instance, Jackson says that Agent Quinn failed to mention that Yee acknowledged that UCE 4773 had donated his limit. Jackson also states that during the meeting, UCE 4773 discussed bundling money, the way UCE 4773 did it before, and give the checks to [redacted].

When one looks closely at what Agent Quinn wrote in Wire affidavit 3, it is hard to understand exactly what it is that Jackson considers to be a mischaracterization. Agent Quinn wrote:

> "On Wednesday, January 18, 2012, UCE 4773 met with Senator YEE, JACKSON, and [redacted] at Senator YEE's office in Sacramento. Some of the conversation revolved around retiring Senator YEE's campaign debt. UCE 4773 discussed the $1000 contribution he had been asked to make. Senator YEE acknowledged that UCE 4773 had already contributed the legal maximum amount. In light of that fact, UCE 4773 asked how he could make a $10,000 contribution, to which Senator YEE responded to the effect of: "Just give the checks to her [redacted], just how we did it before."

Wire 3 affidavit (Jackson Mot. Exhibit 8) at pg. 25.

What Agent Quinn reported was consistent with Jackson's transcript of the relevant portion of the conversation, as included in his exhibits. *See* Jackson Mot. Exhibit 9. It is also consistent with the government's preliminary transcript of the same part of the conversation. Gov. Exhibit 12, (relevant passage only). What is clear is that Yee and [redacted] were asking UCE 4773 for another $10,000; Yee, [redacted] and UCE 4773 each acknowledged that UCE 4773 had already donated his legal limit for the mayoral campaign; and he could provide the money to the campaign – whether it is called "contributions" or "bundling" – the same way he did before, *i.e.* through coming up with the donors on October 13, 2011 as Agent Quinn described at page 22 of the Wire 3 affidavit. In short, in the Wire 3 affidavit, Agent Quinn accurately recounted the conversation and did not mislead the Court into thinking that Yee or [redacted] said something incriminating when they did not.

14. Purported Misstatement #14: Under the Table Payments

Jackson claims that the Wire 3 affidavit mischaracterized his payments from UCE 4773 as "under the table." While Jackson may be correct that the term "under the table" was not expressly used between the two men, Jackson ignores the following from the communications between UCE 4773 and Jackson regarding the nature of their relationship.

To begin with, on September 13, 2011, Jackson discussed UCE 4773 with UCE 4599. Jackson discussed the need to bring in more money for defendant YEE's mayoral race. UCE 4599 described UCE 4773 as "one of the guys my family does business with . . ." and that UCE 4773 was a "heavy hitter from the Atlanta area" that defendant Jackson should know. UCE 4599 said that UCE 4773 had helped UCE 4599's family a lot, but had his own thing going. Jackson told UCE 4599 that "Raymond [Chow] is totally on board" with Yee. UCE 4599 told Jackson that UCE 4773 wanted to do a lot of business in San Francisco and that "he knows the deal." Gov. Exhibit 31.

By September 26, 2011, Jackson and UCE 4773 discussed UCE 4773 getting money to Yee. "The, the last way is I can get some, some cash through you and then you can just break it up however you, you know, y'all need to break it up . . . ." Gov. Exhibit 3 at pg. 6; Gov. Exhibit 4 at 04:27 *et. seq.* During the same call, UCE 4773 stated to Jackson that his other cell phone did not work that well, and

that UCE 4773 was not used to talking business on that line, "not the kinda business you and I are going to be doing . . . ." Gov. Exhibit 3 at pg. 2; Gov. Exhibit 4 at 00:18 – 00:33.

On January 27, 2012, UCE 4773 and Jackson discussed that UCE 4773 did not want Jackson talking about their business with other people. UCE 4773 stated to Jackson: "No, and it's not a problem, yeah, it's not a problem for me, cause, you know it's uh, and, you know I try to, and, and, you know Keith I ain't gonna try to, don't, don't take this as I'm trying to say I'm you know goody two-shoes straight up clean, um, Mr. Clean, you know, I'm, uh I'm, I'm, I'm part of the game, I, I understand, uh, where I fit, I understand where everybody fits, so, ..." Gov. Exhibit 13, pg. 8.

On February 7, 2012, UCE 4773 and Jackson discussed entering into a contract – the end result of which was that UCE 4773 made it clear he was not interested in contracts. During this conversation, Jackson asked if UCE 4773 reviewed the contract and UCE 4773 said he would get back to Jackson. Gov. Exh. 14. On February 15, 2012, UCE 4773 told Jackson that he did not want to sign the contract, but that they would do some stuff on the side for a while and UCE 4773 would take care of Jackson. Jackson responded that was cool and as long as they were on the same page, Jackson was with UCE 4773. They had therefore established a relationship of payments without any legal contract. Gov. Exhibit 32.

On September 20, 2012, UCE 4599 "described himself as part of a criminal organization with UCE 4773 as a 'money man' who handled money and made them look 'legitimate.'" Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 51.

All of these communications would have left no doubt that the nature of the retainer between Jackson and UCE 4773 was not on the "up and up" and was not an above the table legitimate business relationship. The Wire 3 affidavit was not misleading regarding the relationship or the payments, especially when one considers that when UCE 4773 was withdrawn from the investigation, the payments were assumed for a period of time by UCE 4599.

15. Purported Misstatement #15: The [redacted] Commission Conversation

Jackson alleges that Agent Quinn's Wire 3 affidavit "is false and misleading" as it describes a conversation between him and UCE 4773 on May 18, 2012. Jackson Mot. at pg. 7. In fact, the Wire 3

affidavit was accurate. The totality of the entry is as follows: "On May 18, 2012, UCE 4773 spoke with JACKSON over Target Telephone 1. JACKSON discussed UCE 4773 getting involved in businesses related to the Golden State Warriors moving to San Francisco. JACKSON stated that they are trying to get [redacted] on the [redacted] Commission' which 'will be good for us.'" Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 42. At Exhibit 11 to his motion, Jackson quotes the conversation to which Agent Quinn was referring. Jackson Mot. Exhibit 11. Again, there was nothing inaccurate in Agent Quinn's description of the conversation that took place.

As stated in the Wire 3 affidavit, an unspecified "they" were trying to get [redacted] on the [redacted] Commission and Jackson believed that would be good for himself and for UCE 4773. Contrary to Jackson's claim, at no point in the Wire 3 affidavit did Agent Quinn allege or imply that Jackson was in any sort of position to put someone on the [redacted] Commission himself. The conversation clearly was included for the information that defendant Jackson was describing public officials, including [redacted], that he could assist UCE 4773 to influence for their benefit, not because defendant Jackson was some kind of "kingmaker" in San Francisco politics.

16. Purported Misstatement #16: Jackson's Participation in Conversations Between UCEs on May 30, 2012

Jackson's discussion of the May 30, 2012, lunch involving defendant Jackson, UCE 4599 and UCE 4773 is perplexing. Jackson claims that the Wire 3 Affidavit omits that defendant Jackson "was not a part of the 'up north' conversation . . . . Nor was Jackson a part of the conversation regarding Madison International." But the Wire 3 affidavit clearly stated that:

> On May 30, 2012, UCEs 4773 and 4599 (the UCE that has infiltrated the Hop Sing Tong and is posing as mafia from the east coast) went to lunch with JACKSON in San Francisco. During the lunch, **the two UCEs discussed** their investments together, including UCE 4599's operations 'up north' – a reference to his purported marijuana grows. **UCE 4599 advised UCE 4773** that UCE's father wanted to make sure that UCE 4773 is cleaning the finances of 'Madison International.' **The UCEs also discussed** business with UCE 4599's 'family' back on the east coast. JACKSON discussed how he helped CHOW prepare for a media appearance, including how to handle questions about CHOW's criminal activities. During the lunch they also discussed CHOW's desire to find financing to publish his biography.

Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 42 (emphasis added). Therefore, the Wire 3 affidavit accurately depicted the speakers in the conversation regarding the business between UCE 4599 and UCE 4773. What Jackson claims was omitted from the Wire 3 affidavit was not, in fact, omitted – it was spelled out accurately. The significance of this conversation was that Jackson was present to hear it, and gain a further understanding of the supposed criminal relationship and activities of the two UCEs. Notably, Jackson does not deny that he was present to hear this conversation. *See*, Gov. Exh. 5 (FBI 302 report of meeting documenting Jackson's presence). Further, the Wire 3 affidavit did not inaccurately suggest that defendant Jackson spoke during those particular interactions. This is simply one more in a string of unsubstantiated claims of misrepresentations by Jackson.

17. Purported Misstatement #17: The September 19, 2012, Conversation About Breaking Up a $10,000 Contribution to YEE into $500 For Another Political Candidate

Jackson attacks the following excerpt from Agent Quinn's Wire 3 affidavit: "JACKSON explained that the $10,000 will be broken up into $500 donations to [redacted], who ran for [redacted]. According to JACKSON, [redacted] would then turn the money over to Senator YEE." Wire 3 Affidavit (Jackson Mot. Exhibit 18) at pg. 50. According to Jackson, "Mr. Jackson does not say that the same money will be passed through to Senator Yee." Jackson Mot. at pg. 8. But this is precisely what Jackson's own transcript, at his Exhibit 13, attributes to Jackson: "But you can only still give $500 to her per person, so we can get more people to give more to her and then she will turn around and give it to Leland." So Jackson *did* inform UCE 4773 that [redacted] would give the money to Yee. Jackson also referred to it as "[i]t's like an even swap." Jackson Mot. Exhibit. 13. This purported misstatement is therefore neither material– since the government did not allege any criminal activity related to state violations for campaign "swaps" – nor false.

18. Purported Misstatement #18: The FBI's Investigation into UCE 4773

Jackson contends that the Wire 3 affidavit misrepresented the nature of the investigation into UCE 4773 by the FBI. Jackson. Mot. at pgs. 9-10. That allegation is not supported by any facts, as it could not be. The Wire 3 affidavit candidly disclosed information about the status of UCE 4773 out of an abundance of caution, although no findings had been made against UCE 4773 at that time. As he did

previously in his motion to compel disclosure of information about UCE 4773, Jackson engages in speculation without any actual facts or information. In response to Jackson's previous motion, the government disclosed to this Court, *in camera* and *ex parte*, the information about the investigation of UCE 4773. The Court is aware from that information that Agent Quinn in no way misrepresented the nature of the investigation into UCE 4773.

19. Purported Misstatements in Subsequent Wires 4-7 about 4599 Being a Member of La Cosa Nostra

Jackson attempts to allege that Wires 4-7 contain the same kinds of falsities that he purports to have found in Wire 3. Once again, though, these claims are entirely without merit. For example, Jackson claims that as in Wire 3, the affidavits for Wires 4-7 misrepresented that UCE 4599 portrayed himself to Jackson as a marijuana trafficker, a money launderer, and an east coast member of La Cosa Nostra, an organized crime group. As described above, given the substance of the May 30, 2012, lunch meeting, during which UCE 4599 and UCE 4773 discussed in Jackson's presence their illegal activities, and given the substance of the September 20, 2012, meeting, in which Jackson, Brandon Jackson, and Marlon Sullivan solicited UCE 4599 for narcotics business opportunities, Jackson could have had no reasonable doubt about the nature of UCE 4599's cover story.

20. Purported Misstatements in Wire 4 about the November 16, 2012 Conversation Between JACKSON UCE 4773

Defendant Jackson alleges misrepresentations regarding a November 16, 2012, conversation with UCE 4773 in Agent Quinn's Wire 4 affidavit. Jackson Mot. at 12. Jackson complains about an alleged misrepresentation regarding a November 16, 2012 conversation; however, in making his argument, he references a conversation that took place between Yee and 4773 on October 14, 2011. See, Jackson Mot. at 12, referring to Chattejee Dec. Exh. 8). Jackson's allegations about misstatements regarding that conversation appear in his motion at page 6, item 11, and are discussed above at section 11. As discussed above, Agent Quinn accurately reported the contents of that conversation in the Wire 3 affidavit. It is not mentioned in the Wire 4 affidavit.

21. Purported Misstatements in Wire 4 About Marijuana and the Oakland City Council

Jackson alleges a misstatement in Agent Quinn's Wire 4 affidavit regarding marijuana and bribery. Jackson Mot. at 12. But it is clear in that affidavit that the conversation could have been regarding bribery or not, as Agent Quinn used the phrase "possible bribery." Jackson and the CHS were discussing city licenses, and whether Jackson knew anyone on the Oakland City Council. It was not unreasonable for Agent Quinn to characterize such a conversation as possibly involving bribery. Further, Jackson's claim is immaterial: in a federal wiretap application, federal law prohibits all marijuana cultivation and sales. As with many of Jackson's claims of falsehoods, it is also a relatively minor and unimportant point in the overall scope of the probable cause supporting the Wire 4 affidavit.

22. Purported Misstatements in Wire 4 Regarding UCE 4599 Writing a Check For Yee if Yee Issued a Proclamation for the Chee Kung Tong

Jackson alleges a misrepresentation in the Wire 4 affidavit regarding UCE 4599's promise to write a check for Yee, if Yee would issue a proclamation to the Chee Kung Tong and Raymond Chow. Jackson characterizes this as a misrepresentation because Agent Quinn failed to say that Yee had already agreed to write the proclamation. Jackson Mot. pg. 13. In fact, the sequence of events was accurately reported by Agent Quinn in the Wire 4 affidavit. Agent Quinn reported that Jackson told Yee on November 20, 2012 that UCE 4599 would clear up the campaign debt if Yee would help out Chow. Jackson Mot. Exh. C, at 23. Yee demurred because he did not want to be seen as too close to Chow. *Id.* at pg. 25-26. But then when Yee met with UCE 4599 in Jackson's presence on January 22, 2013, Yee agreed to do the proclamation, understanding that this official act was in exchange for a donation from UCE 4599. *Id.* at 90-91. The fact that Yee was promised a check in exchange for a proclamation and agreed to issue the proclamation, with the check written later, does not obviate the original bribe agreement.

23. Purported Misstatements in Wire 5 Regarding The Status of the Investigation Into UCE 4773

Jackson alleges that the Wire 5 affidavit, submitted by FBI Special Agent Maya Clark, again misrepresented the status of the FBI's investigation in UCE 4773. This is nothing more than a rehash of Jackson's previous arguments regarding the investigation of UCE 4773. Like those arguments, this one is also speculative and unsubstantiated. *See, e.g.,* discussion of Purported Mistatement #18, *supra.*

24. Purported Misstatements in Wire 5 That a February 14, 2013, Call between CHS #11 and JACKSON Illustrating JACKSON's Attempting to Secure Projects for CHS #11 In Exchange For Monetary Payments

Jackson contests the meaning of quoted information in the Wire 5 Affidavit. Jackson Mot. at 13. But he does not quarrel with the accuracy of the quoted language, only the significance to be drawn from it, and argues that there are permissible innocent inferences. That may be so, but speculating about a different, possibly inculpatory, inference does not render the Wire 5 Affidavit false. It is also a single conversation in the entirety of the facts included in the Wire 5 Affidavit. It is highly unlikely that the Court issued orders to intercept communications on the basis of one inference drawn from one single quote after reading the entire Wire 5 Affidavit. In any event, there was ample basis elsewhere in the Wire 5 affidavit for the inference made by Agent Clark. Wire 5 affidavit (Jackson Mot. Exhibit 20) at pg. 24, lines 1-13. More importantly, Jackson impliedly concedes, through lack of challenge to the contrary, that the remainder of Agent Clark's Wire 5 affidavit was accurate.

25. Purported Misstatements Raised by Yee

In his motion, Yee refers to and apparently joins Jackson's motion insofar as it identifies particular purported misstatements. Yee Mot. at pg. 5, n. 5. For the reasons discussed above, all of those purported misstatements are in fact true and accurate.

Yee also argues that a *Franks* hearing is appropriate because each wiretap affidavit allegedly "rehashed" or carried over its necessity arguments from the preceding affidavit. Yee. Mot. pgs. 16-20. The government addresses this allegation in greater detail below, in the section regarding necessity. *See infra.*, Section d - Wire 3 and Wires 4-7 Did Not Rely On Previous Affidavits To Establish Necessity. In short, though, for *Franks* purposes, there was no rehashing: a fair, reasonable reading of each of the contested affidavits demonstrates that each, as a whole, alleged specific, individualized, updated reasons why wiretaps were necessary. In any event, Yee's argument is entirely unsustainable as to the Wire 3 affidavit, because Yee does not suggest that any statements were carried over from the preceding affidavit in Wire 2.

b. None of the Alleged Misstatements or Omissions Require a hearing

A defendant is only entitled to an evidentiary hearing on alleged falsehoods in a wiretap affidavit if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks*, at 155-56; *see United States v. Fernandez*, 388 F.3d 1199, 1237-38 (9th Cir. 2004) (applying *Franks* to wiretaps); *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000) (same).

The defendants have entirely failed to meet their burden for obtaining an evidentiary hearing under *Franks v. Delaware,* 438 U.S. 154 (1978). First, as spelled out above, the allegations of misstatements, false statements, and material omissions they identify are each individually and separately inaccurate. Second, assuming *arguendo* that the Court were to determine that one or more of the contested statements actually involved misstatements or material omissions, the government submits that there is absolutely no basis to believe that the affiants made the statements "knowingly and intentionally, or with a reckless disregard for the truth." *Franks* at 155-56. At worst, there may be a few minor mistakes over the course of several lengthy documents. Unlike some affidavits – where an officer or agent might possibly believe that he or she could pull off misleading a Court because the underlying basis for the affidavit, whether informant or unrecorded observation, will never come to light – every communication summarized for the Court by the affiants, with the exception of one expressly noted conversation, was observed by other federal agents and recorded through either a body wire or a recorded telephone line. It was, therefore, known by the affiants and everyone else assisting with in the preparation of the wire affidavits that they would be reviewed in painstaking detail one day. It makes no sense that the affiants would intentionally or recklessly misreport to the Court, knowing there was a record of everything they were summarizing in their affidavit. The fact is that the wire affidavits in this case are incredibly detailed and accurate, and a diligent effort was made to report *all* the facts to the Court – even those that were exculpatory – so that the Court would have the entire record before it.

In fact, it is remarkable how far Jackson had to reach in his attempt to point out misstatements in

the Wire 3 Affidavit. That affidavit is a very lengthy document - 89 pages - and it incorporated two other wiretap affidavits that preceded it. That Jackson can only point out minor and tangential points to try to weave together an allegation of intentional or reckless misstatements is significant in and of itself. While this argument overlaps with the point that there is more than sufficient probable cause in the Wire 3 affidavit regardless of any alleged misstatements, it speaks to the overall accuracy of the Wire 3 affidavit. Nowhere can Jackson or Yee challenge the core point of the Wire 3 affidavit: that defendants Jackson and Yee were offering to accept campaign contributions in exchange for official acts and that they performed official acts for the money given to them by UCE 4773 and on the pledge of additional payments.

On that point, defendant Jackson spends a great deal of time and energy trying to allege that the Quinn Affidavit misrepresented the nature of the campaign contributions given to defendants Jackson and Yee by UCE 4773. Jackson tries mightily to distinguish between contributions given by UCE 4773 and contributions "raised" or "bundled" by UCE 4773. The fact of the matter is that, for the probable cause determination of the federal crimes alleged in the Wire 3 affidavit, the distinction does not matter. Campaign contributions to the San Francisco mayoral race in excess of $500 were illegal under local campaign finance laws. For the federal crime of honest services fraud, however, after the Supreme Court's decision in *Skilling*, the government must allege and prove that a scheme to defraud of honest services involved either bribery or extortion. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010). Although it may be indicative of an intent to deceive or cheat, it is insufficient for honest services fraud that a local public official violated their local legal obligations if there is no further proof of bribery or extortion. Therefore, even if every allegation regarding campaign contributions related to the $500 limit was false – and they were not – it would not materially change the probable cause described in the Wire 3 Affidavit and found by this Court: that probable cause existed that Jackson and Yee were trading official action by Yee for money and were utilizing the Target Telephones to carry out that scheme. Notably, the defendants cannot make any allegation of misstatements in many of the key "dirty" conversations and activities in the Wire 3 affidavit. For example, they have not and cannot make any allegation of misstatements regarding:

1. Jackson's pledge to UCE 4773 for official action for WellTech on June 2, 2012: "JACKSON stated that Senator YEE told JACKSON that 'whatever [UCE 4773] needs from him . . . he's open to help as much as he can.' JACKSON said that Senator YEE was here for UCE 4773, and that whatever UCE 4773 needed, UCE 4773 just had to tell Senator YEE." And regarding helping WellTech in San Mateo County, "JACKSON stated 'this will be an easy ask for Leland.'" Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 42.
2. On June 5, 2012, Jackson stated to UCE 4773: "whatever you need from [Senator YEE], you got him." *Id.* at pg. 43.
3. On June 19, 2012, Jackson's reassurances to UCE 4773, while asking for further contributions: "UCE 4773 asked how Senator YEE felt about UCE 4773's statement that he needed to get something out of it. JACKSON stated that Senator YEE was 'fine with that.' JACKSON stated that Senator YEE told JACKSON to tell UCE 4773 'whatever he could do to help you,' and that UCE 4773 has been committed to Senator YEE 'and [Senator YEE] wants to find a way to help.'" *Id.*
4. On September 4, 2012, at 455 Golden Gate Avenue, UCE 4773 met with Yee and Jackson. During that meeting, as described in the Wire 3 affidavit, UCE 4773 tied his providing another $10,000 to Yee and Jackson to Yee's assistance with the California Public Health Department, ". . . if you can do that then 10 [$10,000] is no problem at all." Yee also discussed how another Secretary of State in California had been caught in a public corruption scandal and commented "if it was done, just do it the right way and don't get caught." *Id.* at pgs. 47-48.
5. On September 10, 2012, Yee asked for the number of the individual at California Public Health Department that UCE 4773 wanted him to contact. *Id.* at 48-49.
6. On September 11, 2012, Yee discussed the parameters of the contact with the Public Health Department further with UCE 4773. *Id.* at 49.
7. On September 18, 2012, defendant Jackson told UCE 4773 to contact defendant Yee. *Id.*
8. On September 20, 2012, UCE 4773 and defendant Yee discussed the letter that defendant Yee would write to the Public Health Department for UCE 4773. *Id.* at 51.

9. On September 24, 2012, UCE 4773 and Jackson discussed a version of the letter that UCE 4773 had sent by email to defendant Yee. They discussed being careful about how they discussed the quid pro quo around defendant Yee. UCE 4773 said "Between you and me, Keith, and you know I won't say this to him, if he can get that letter done, I can hook you up. We'll do it like that." And "JACKSON responded 'okay, I'll just tell him to get that damn letter out man, he needs to . . . .'" They talked about being careful and not wanting their relationship to hit the papers. "UCE 4773 said he would not put any more money out there unless he was getting something. JACKSON agreed, stating 'I understand that and I think he understands that too.'" *Id.* at 52-53.
10. On September 24, 2012, Jackson emailed a draft version of the letter from Yee to UCE 4773. *Id.* at 54.
11. On September 25, 2012, Jackson described that Yee's support of UCE 4773 might be better in a phone call to the Public Health Department than a letter because that was a document that could be used against defendant Yee. *Id.* at 55.
12. On September 26, 2012, Jackson told UCE 4773 to keep the letter and that Yee would make a phone call to the Public Health Department for UCE 4773. *Id.* at 56-57.
13. On September 27, 2012, Yee spoke with UCE 4773, asked for more money and said "so if there's anyway you can get the money sooner rather than later, that will really, really be helpful because, uhm, you know, uhm, Keith is going to have to deal with it. . . . ." *Id.* at 56-57.
14. On October 1, 2012, Jackson solicited money from UCE 4773 and they discussed Yee's comfort level with UCE 4773 and what UCE 4773 wanted done. *Id.* at 57.
15. On October 17, 2012, Jackson and UCE 4773 discussed Yee making the call to someone from the Public Health Department for UCE 4773. *Id.* at 58.
16. On October 18, 2012, Yee and UCE 4773 discussed Yee making the call for UCE 4773 to a person from the Public Health Department. UCE 4773 informed defendant Yee that the person had taken a loan from UCE 4773. *Id.* at 58-59.
17. On October 18, 2012, defendant Yee made the call on behalf of UCE 4773 to the person he

believed worked for the Public Health Department. *Id.* at 59-60.

18. On October 23, 2012, UCE 4773 and Jackson discussed Yee's efforts to raise more money and UCE 4773's need for the letter of support. *Id.* at 60-61.

19. On November 6, 2012, defendant Jackson and UCE 4773 continued to discuss the letter for UCE 4773. *Id.* at 61-62.

As these unchallenged facts clearly and unequivocally demonstrate, the Wire 3 affidavit provided more than probable cause for the crimes alleged with or without the statements that Jackson erroneously claims were inaccurate. There is no basis for a hearing to determine whether or not the Wire 3 affidavit should have used the word "contribute" or "raise contributions," or to determine who was trying to get particular individuals onto the [redacted] Commission, when the meat of the Quinn Affidavit – the scheme to exchange official action for money – has not been, and cannot be, alleged to have been false or misleading in any capacity.

These same unchallenged facts powerfully undercut Jackson's *ipse dixit* claim that "at no time did Mr. Jackson engage in criminal conduct with UCE 4773." Jackson Mot. at 11. As is spelled out in detail in the Quinn Affidavit – and as this Court previously found by issuing the interception order – there was at least probable cause to believe that defendants Jackson and Yee were engaged in several crimes with UCE 4773 and with UCE 4599[5]. As there is clearly more than probable cause to believe that defendants Jackson and Yee were engaged in the criminal conduct listed in the Quinn Affidavit – with or without the portions that defendant Jackson challenges – and that the Target Telephones were utilized to commit those crimes, the communications intercepted should not be suppressed and no *Franks* hearing is required.

It is notable that defendant Jackson does not even attempt to explain how the Quinn Affidavit, even stripped of any alleged misstatements, would not still demonstrate probable cause. Jackson Mot. at

[5] Notably, Jackson completely ignores the portions of the Wire 3 affidavit that spelled out his involvement with UCE 4599 and co-defendants Brandon Jackson and Marlon Sullivan to distribute narcotics. He ignores them because they stand as independent probable cause for the interception of his communications and because he cannot refute the statements made about those activities in the Wire 3 affidavit. His motion should be denied on that grounds alone. For example, the meeting of September 20, 2012, between defendant Jackson, defendant Brandon Jackson, defendant Sullivan, and UCE 4599 was sufficient by itself to authorize interception of Target Telephone 1 for narcotics trafficking.

15-16. In fact, his analysis in section IV of his motion concludes with the notion that he has pointed out some misstatements. *Id.* It never addresses the remaining probable cause. *Id.* This omission speaks volumes about the strength of the probable cause presented in the Quinn Affidavit and is a basis to deny defendant Jackson's motion without engaging in the review of each alleged misstatement.

Given the inaccurate and peripheral, albeit prolific, nature of defendant Jackson's challenges to the Quinn Affidavit and the overwhelming evidence of probable cause with or without the challenged statements, this Court should deny defendant Jackson's motion to suppress and should not hold a *Franks* hearing. As a result, no hearing need be conducted as to any of the subsequent affidavits in support of wire and electronic interceptions.

c. <u>There was Probable Cause in Wire 3 to Intercept Target Telephone 2</u>

Yee argues on several grounds that there was no probable cause in Wire 3 to intercept his telephone, Target Telephone 2. Yee Mot. Pgs. 5-8. He first argues that probable cause was lacking because Wire 3 did not name as target offenses several of the offenses with which Yee was ultimately charged, such as honest services fraud and conspiracy to traffic in firearms. Yee Mot. pg. 5, lines 19-21. This argument is baseless. The government is unaware of, and Yee does not cite to, any authority suggesting that in order to be sufficient, a wiretap affidavit must identify all, or even any, of the offenses with which an individual is ultimately charged. To the contrary, "[a]lthough the conversations to be intercepted by electronic surveillance are necessarily identified partly in terms of the suspected offenses to which they will relate, *the content of the communications to be intercepted cannot be known in advance, and the authorizing order need not describe every aspect of the criminal activity expected to be revealed by the surveillance*. 'The order must be broad enough to allow interception of any statements concerning a specified pattern of crime.'" *United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979)(emphasis added)(upholding interception of communications relating to theft of painting, even though order authorized interception of communications relating to theft of diamonds), *quoting United States v. Tortorello*, 480 F.2d 764, 780 (2nd Cir.), *cert. denied*, 414 U.S. 866 (1973); *see also Carneiro*, 861 F.2d at 1179 (approving of interception of communications relating to marijuana trafficking even though defendants initially suspected of trafficking only cocaine). Moreover, in this particular case,

even the most clairvoyant of wiretap affiants could not have accurately predicted all of the offenses with which Yee would ultimately be charged, given the stunning turn that the investigation took when Yee introduced the UCE to someone connected to firearms traffickers in order to facilitate international firearms trafficking deals with the UCE in exchange for money.

Yee also argues that Wire 3 lacked probable cause not just for the offenses with which Yee was later charged, but for the target offenses listed in the affidavit itself. This argument is also baseless. In support of this argument, Yee lists various actions that he allegedly took that are described in the Wire 3 affidavit, and suggests that those acts were either not criminal in nature, did not involve Target Telephone 2, or did not personally involve Yee. Yee Mot. pgs. 6-7. Yee's list, however, is fundamentally flawed. He cherry-picks those meetings and telephone calls from the Wire 3 affidavit that are most helpful to him, and ignores and mischaracterizes those that are most damaging. For example, the following four excerpts from the Wire 3 affidavit were either overlooked or mischaracterized in Yee's list:

> On October 14, 2011, at approximately 9:10 p.m, UCE 4773 and Senator YEE met with UCE 4773 at the Marriot Marquis coffee shop in San Francisco, CA. During that conversation, UCE 4773 discussed the fact that he had already raised $11,000 and was prepared to give another $10,000, but had some concerns. One was a recent San Francisco Chronicle article about straw donors breaking up campaign contributions for Mayor Ed LEE in the race for San Francisco Mayor. In that context, UCE 4773 said that he knew that he could not give $10,000 as a campaign contribution. UCE 4773 was concerned about the consequences of getting caught, in terms of losing momentum in his financial projects and relationships with his clients. Senator YEE responded to these concerns by saying that his numbers in the polls were improving; he foresaw winning the election; he was seeking to raise another $300,000 in the next 30 days; and was interested in UCE 4773 assisting in raising more money. **Senator YEE said that they had to be careful. Senator YEE said that because he was receiving matching public funds, he would be audited and there was a possibility that UCE 4773's money would be examined. Senator YEE said that UCE 4773 should "cover your tracks," and if UCE 4773 thought he could not do that, then he should not contribute.** UCE 4773 and Senator YEE discussed alternative ways to donate that did not involve limits, and Senator YEE said that UCE 4773 could contribute $10,000 to a ballot measure that Senator YEE was supporting. He noted that such a contribution would be legal and explained that publicity about the ballot measure would feature him in a positive light. **UCE 4773 also told Senator YEE that he was expecting something for the contributions, i.e. "It's too much money ... not to get something," which Senator YEE acknowledged.** Senator YEE stated that he would appreciate further contributions of money, and noted he had a lot of friends in Sacramento and that there were "tremendous"

> opportunities at the local level, that is, "whoever's gonna be the mayor controls everything." At a later point in the conversation, after UCE 4773 discussed the investors and the capital they could bring to development projects in San Francisco and to the Peninsula, Senator YEE said that if he won the election, he would control $6.8 billion. He said that he was not interested in making money himself, and was seeking the job of Mayor to help the City. However, he also said that he was "more than happy to help friends make money."

Wire 3 Affidavit at pgs. 22-23 (emphasis added).

> On September 4, 2012, UCE 4773 met with Senator YEE and JACKSON at 455 Golden Gate Avenue in San Francisco. Senator YEE has a local office in the building and the meeting took place in the mezzanine level cafeteria of the building. Senator YEE mentioned that he would be assisting the campaign for the President of the United States during the following week because they needed some "yellow faces." Senator YEE told UCE 4773 that he was $32,000 away from paying off his outstanding campaign debt and stated ". . . if you can do another $10,000, that would be good. . . . If you give me ten, I've got a tournament coming up in October at Harding Park and I've got a lot of lobbyists coming in . . . so I will comp you for that." UCE 4773 told Senator YEE that he had a meeting set for September 6, 2012, with someone in procurement at the State of California Public Health Department and that he had a good lead on getting a contract with them for the software consulting company run by CHS #12. UCE 4773 told Senator YEE that UCE 4773 was going to need a phone call or two on behalf of the software consulting company. Senator YEE said to just let him know. **Senator YEE then discussed setting up a meeting for UCE 4773 and the software consultants with the chief technology officer. UCE 4773 discussed the desired telephone call again and told Senator YEE " . . . if you can do that then 10 [$10,000] is no problem at all." Senator YEE said to just let him know.** UCE 4773 and Senator YEE then discussed the CALPERS scenario and Senator YEE stated that he could not introduce UCE 4773 because of the scrutiny that would bring. Instead, Senator YEE stated he would introduce UCE 4773 to [redacted] a fund manager in San Francisco. UCE 4773 asked Senator YEE how soon he needed the $10,000 and Senator YEE stated "as soon as possible." UCE 4773 told Senator YEE that bankers don't do as soon as possible and Senator YEE stated by the last week of September. UCE 4773 and Senator YEE talked about UCE 4773 moving to San Francisco and UCE 4773 joked about being registered in San Francisco by November of 2014 when Senator YEE would run for California Secretary of State. Senator YEE laughed and said UCE 4773 didn't need to move to San Francisco, and stated "we can just find you an address . . . there are homeless shelters . . . you don't even have to live there."…
>
> Senator YEE then stated that [redacted] several years ago and that [redacted] had to resign because someone on his staff wore a wire for the FBI. [redacted] was collecting money in his office which was a no-no and [redacted] was giving money to a non-profit and getting back the same amount the same day. **Senator YEE stated that if it was done, just do it the right way and don't get caught.**

Wire 3 Affidavit at pgs. 46-48 (emphasis added).

> On September 19, 2012, **UCE 4773 spoke with Senator YEE by telephone over Target Telephone 2.** UCE 4773 requested that Senator YEE write a letter on behalf of the computer consulting company to the California Department of Public Health so that the company could get contracts with that department. Senator YEE stated "why don't you do this? Why don't you draft something for me? And then what I will do I will play with some of the words so I can include. And what I will do, in a letter, I'll indicate I met with whatever that gal's name was, and I was really impressed with her credentials, and the potential of her helping out individuals in my district, San Mateo County. And encouraging her to pursue ideas in the county, but in California, and try and help streamline the process and save us money." The call ended. **Telephone analysis then shows calls between Target Telephone 1 and Target Telephone 2. Senator YEE then called back using Target Telephone 2 and gave UCE 4773 the email address of Senator YEE's wife so that UCE 4773 could send a draft of the letter and Senator YEE could then re-write the letter in his own language. UCE 4773 asked Senator YEE how much debt he had remaining. Senator YEE said $32,000 and that he was hoping to get $10,000 from UCE 4773. Senator YEE stated "what we're interested in doing is getting $10,000 to [redacted], who ran for [redacted]. And then. All this is legal. She does $10,000, I do $10,000 and we swap. You've got people who donate to me, they've maxed out. They can't donate anymore. So they write to [redacted]. Then she gets her donors to write $10,000, and we'll swap. It makes it a lot easier, that's all. Okay?" Senator YEE told UCE 4773 to handle it through JACKSON. Following that call, telephone analysis shows calls between Target Telephone 1 and Target Telephone 2. I believe that there is probable cause that those calls related, in part, to the exchange of the letter for additional contributions by UCE 4773 to retire the debt of Senator YEE.**
>
> **On September 19, 2012, approximately 20 minutes after the call with Senator YEE, UCE 4773 received a call from JACKSON using Target Telephone 1. JACKSON stated he had just spoken with Senator YEE. JACKSON reiterated the need for the money.** JACKSON told UCE 4773 that Senator YEE was very comfortable with UCE 4773, but that Senator YEE doesn't want to talk about the money and would prefer if that was handled by JACKSON. UCE 4773 told JACKSON that he understood if Senator YEE didn't want to discuss the money, but that UCE 4773 would ordinarily just keep his money until Senator YEE was comfortable. UCE 4773 told JACKSON that he would discuss it the following day with Senator YEE. JACKSON explained that the $10,000 will be broken up into $500 donations to [redacted], who ran for [redacted]. According to JACKSON, [redacted] would then turn the money over to Senator YEE. Later that evening, Target Telephone 2 called (916) [redacted], a telephone number associated with [redacted]. I believe that there is probable cause that the calls over the Target Telephones related, in part, to the exchange of acts by Senator YEE for campaign contributions from UCE 4773.

Wire 3 Affidavit at pgs. 49-50 (emphasis added).

> On September 24, 2012, UCE 4773 called JACKSON on Target Telephone 1. **JACKSON stated "Leland [YEE] is all over me, he wants**

> **to clean up that debt man, so I got to . . . he called me twice yesterday." UCE 4773 asked if Senator YEE got the email. JACKSON said Senator YEE had everything on his end and would be in Sacramento all week.** JACKSON mentioned Senator YEE's golf tournament that would have Sacramento contacts and lobbyists there. JACKSON stated that the event was for a ballot measure that would help Senator YEE run for Secretary of State and that Senator YEE couldn't do anything until he cleared up his debt. **UCE 4773 asked "Can he get me that letter in the next couple of days?" JACKSON stated "Yeah, let me call him now and see where he's at on that . . . and then . . . ." UCE 4773 stated "I know I can't talk to him about it, as far as the letter first . . . ." JACKSON stated "Exactly."** I believe this is a reference to UCE 4773 not discussing openly with Senator YEE that the money was for the letter. JACKSON said Senator YEE was anxious to announce for Secretary of State. **UCE 4773 said "Between you and me, Keith, and you know I won't say this to him, if he can get that letter done, I can hook you up. We'll do it like that." JACKSON responded "okay, I'll just tell him to get that damn letter out man, he needs to . . . . [UCE 4773], one thing about him with you, he's really appreciative of what you've done and he's in your corner 110% so . . . . He really likes you, man . . . he really wants to . . . he likes the nucleus of our team that we have and, you know, ... But he just wants to move forward and be safe you know. That's his biggest concerns because they just jammed up Ed LEE, but he got . . . they investigated him, but he's out, they dropped the charges, but, you know, nobody wants that shit to hit the papers." UCE 4773 stated he didn't want to be in the papers either. UCE 4773 said he would not put any more money out there unless he was getting something. JACKSON agreed, stating "I understand that and I think he understands that too."** JACKSON stated he would let UCE 4773 know and asked if Senator YEE was going to send him a copy. UCE 4773 stated he was putting together a couple of California clients in a package to show that the consulting company has relationships there. JACKSON promised to text UCE 4773 to let him know the status. UCE 4773 said that was fine and that he understood it was hard to move fast and that they were worried about getting caught up. UCE 4773 stated he puts the money out there because of JACKSON and JACKSON said Senator YEE understood that. **Following that call, telephone analysis showed multiple calls between Target Telephone 1 and Target Telephone 2.**

Wire 3 Affidavit (Jackson Mot. Exhibit 18) at pgs. 52-53 (emphasis added). Additional excerpts from the Wire 3 Affidavit that Yee either overlooked or mischaracterized in his motion can be found at pg. 54 line 18 – pg. 55 line 2; pg. 56, line 17 – pg. 57 line 6; and pg. 60 lines 8-17. In short, Wire 3 contained ample probable cause to believe that the Target Offenses were being discussed on Target Telephone 2.

Yee makes one final argument with respect to probable cause. He argues that in attempting to establish necessity, the government actually demonstrated a lack of probable cause; that is, because traditional investigative techniques had failed to uncover evidence against Yee, there was insufficient

probable cause to support a wiretap. Yee Mot. at pg. 8. This is a curious argument to make. First of all, as demonstrated in the excerpts above and as demonstrated throughout the Wire 3 affidavit, traditional investigative techniques had uncovered significant evidence against Yee, just not enough to achieve all of the goals of the investigation. More importantly, though, accepting Yee's argument would create a legal conundrum: carried to its logical conclusion, it would mean that whenever the government demonstrates necessity, it must therefore lack probable cause. This, of course, is entirely inconsistent with the purpose of the necessity requirement. *See, e.g. Blackmon,* 273 F.3d at 1207 (reasoning that the purpose of the necessity requirement is "to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.")

d. Wire 3 and Wires 4-7 Did Not Rely On Previous Affidavits To Establish Necessity

Yee alleges that Wire 3 and subsequent Wires 4-7 are deficient because they carry over necessity arguments from earlier wiretap applications filed against other conspirators with regards to other telephones. Yee Mot. at pg. 9. At the outset, this argument plainly fails with respect to Wire 3. Wire 3 was preceded by two wiretaps, Wires 1 and 2, which targeted a telephone used by George Nieh, and a Mercedes Benz that Nieh used to drive Kwok Cheung Chow. Had the Wire 3 Affidavit attempted to carry over the necessity justifying the previous wiretaps on Nieh's telephone and car, then clearly Wire 3 would have been insufficient. This was precisely the scenario that the Ninth Circuit disapproved of in the cases that Yee cites in his motion. *See, e.g. United States v. Carneiro*, 861 F.2d 1171 (9th Cir. 1988). In *Carneiro*, the Court approved of an initial wiretap targeting a telephone used by a drug trafficker named McNeil, but suppressed subsequent wiretaps targeting telephones used by McNeil's source, Harty, and Harty's source, Boyd. The Court suppressed the latter wiretaps because the government had not conducted any traditional investigation into Harty and Boyd, instead carrying over its previous investigation of McNeil to establish necessity as to Harty and Boyd. *See also United States v. Santora*, 600 F.2d 1317, 1322 (9th Cir. 1979)(upholding initial wiretap but suppressing subsequent wiretap that relied "almost entirely" on previous affidavit to establish necessity.") The carry-over scenario described in *Carneiro* did not occur here. To the contrary, Wire 3 describes with remarkable detail numerous traditional investigative techniques that agents employed specifically towards Yee and

Jackson over the course of several months in an effort to build a case against them. Wire 3 affidavit (Jackson Mot. Exhibit 18) at pgs. 69-87.

Yee's argument that Wires 4-7 carry over the necessity arguments from Wire 3 is equally unavailing. He claims that the affidavits are "replete with boilerplate, generic language," and lists eight excerpts from the affidavits that he alleges are included verbatim in every affidavit. This claim is specious. The eight supposedly boilerplate excerpts he cites appear to be carefully selected from introductory and concluding sentences; he entirely overlooks the wealth of case-specific details unique to each affidavit described in the substantive discussions on necessity. For example, the first supposedly boilerplate excerpt he cites is in the introductory paragraph in the necessity section, and tracks the language of the necessity requirement set forth in 18 U.S.C. § 2518(1)(c). Yee Mot. at pg. 10. The second supposedly boilerplate excerpt he cites is also in the introduction to the necessity section, and is followed immediately by this sentence: "I discuss details, both positive and negative, about the use of each technique with regard to JACKSON, Senator YEE, and the other Target Subjects and Interceptees, the success or failure of the technique, and what the technique has accomplished or failed to accomplish with regard to the goals and objectives of this investigation. When a technique was not employed, I provide an explanation." Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 70.

The third supposedly boilerplate excerpt Yee cites does not even occur in the Wire 3 affidavit; thus, Yee's claim that the affidavits borrow *verbatim* boilerplate language from each other is somewhat suspicious at best. Yee. Mot. at pg. 10. The following similar line *does* appear in Wire 3: "I do not believe that CHS #11 and CHS #12 could be used to fully achieve the goals of the instant investigation." That line is preceded by a lengthy discussion of the successes and failures of CHS #11 and CHS #12 leading up to the date that Wire 3 was submitted for authorization. Along similar lines, Yee's fourth supposedly boilerplate excerpt is pulled from the closing paragraph of the discussion on CHSs, and overlooks the detailed, case-specific discussion of CHS #11 and CHS #12 immediately preceding it. Each subsequent affidavit also discussed CHS #11 and CHS #12, but focused primarily on any new successes they had achieved (or failures they had endured) since the submission of the previous affidavit. For example, Wire 4 contains a discussion of how CHS #11 had taken an increased role in

engaging with new interceptees, and how CHS #12 was possibly in a position to discuss online voting technology with YEE. Similarly, Wire 5 explains how CHS #11 had recently had direct contact with Yee; Wire 6 candidly explained how CHS #11's importance had recently grown significantly, but that he/she was still encountering difficulties in achieving the goals of the investigation; and Wire 7 explained how Yee was uncomfortable dealing with CHS #11 because he suspected CHS #11 was "wearing a wire." In short, each affidavit contained far more than a "repetitive narrative of predictable, frequently used law enforcement expressions."

In any event, even if this Court finds that there *was* some conclusory language repeated in each affidavit, such language is by no means fatal. The Ninth Circuit has expressly held that "[t]he presence of conclusory language in [an] affidavit will not negate a finding of necessity if the affidavit, as a whole, alleges sufficient facts demonstrating necessity." *United States v. Torres*, 908 F.2d 1417, 1423 (9th Cir. 1990). That is precisely the case here: a fair, reasonable reading of each of the contested affidavits demonstrates that each, as a whole, alleged specific, individualized, updated reasons why wiretaps were necessary. *See also Blackmon*, 273 F.3d at 1210-11 (panel criticized "boilerplate" language, but did not hold that such language could never be considered, particularly when combined with language specific to each individual investigation).

e. <u>The Government Was Not Required to Recruit Additional Informants In Order to Demonstrate Necessity</u>

Yee argues that necessity is lacking because the government failed to recruit additional informants. This, however, goes far beyond what is required by statute. 18 U.S.C. § 2518(1)(c) requires the government to describe investigative procedures that have been tried and failed. This the United States did; in each affidavit it identified how it had used particular informants, how those informants had had some limited successes, and how and why they had failed to achieve the overall goals of the investigation. Section 2518(1)(c) does *not* require the government to repeat failed procedures once it has tried them. Indeed, as the Ninth Circuit has noted, "[t]he statute does not mandate the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation becomes redundant or impractical or the subjects may be alerted and the

entire investigation aborted by unreasonable insistence upon forlorn hope." *Baker*, 589 F.2d at 1013. To the contrary, "the mere attainment of some degree of success during law enforcement's use of traditional investigative methods does not alone serve to extinguish the need for a wiretap." *United States v. Bennett*, 219 F.3d 1117, 1122 (9th Cir. 2000).

The Ninth Circuit's decision in *United States v. Rivera*, 527 F.3d 891 (9th Cir. 2008) is particularly instructive in this regard. There, defendants argued that a wiretap should have been suppressed because law enforcement "did not use traditional investigative techniques as much as it could have." *Id.* at 903. In particular, defendants argued that law enforcement could have made additional use of confidential sources. The Ninth Circuit rejected defendants' arguments, reasoning that "we have repeatedly held that 'law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap.'" *Id.*, *quoting Canales-Gomez*, 358 F.3d at 1225-26 (other citations omitted); *see also Carneiro*, 861 F.2d at 1178, *citing with approval United States v. Webster*, 734 F.2d 1048, 1055 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984)(courts will not invalidate a wiretap order because defense lawyer are able to suggest *post factum* some investigative technique that might have been used and was not).

United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987), to which Yee cites for support, is plainly distinguishable. There, a wiretap affidavit portrayed an informant as "an innocent, uninvolved eavesdropper" to a defendant's drug dealing activities, and claimed that the defendant had insulated himself so that no informants could be used to penetrate the defendant's organization. *Id.* at 1471. The affidavit did *not* disclose that the informant had a sexual relationship with the defendant, had been present on several occasions when the defendant had engaged in drug deals, and had become trusted enough to be permitted to identify potential drug customers for the defendant. The affidavit also referred to the same informant as both "Source Two" and "Individual A." The Ninth Circuit upheld suppression, concluding that "the specific facts withheld from the issuing judge about [the informant] reveal that traditional techniques could have led to the successful infiltration of the entire enterprise." *Id.* at 1472. Here, even assuming the Court agrees that the government should have used additional informants beyond CHS #11 and CHS #12, defendant's motion is devoid of any indication that such

hypothetical and unidentified informants could have "led to the successful infiltration of the entire enterprise." Accordingly, *Simpson* is distinguishable.

Jackson goes one step further than Yee, identifying particular individuals that he believes the government ought to have attempted to use as an informant before seeking a wire. For example, Jackson suggests that the government should have made more use of one of the target subjects listed in Wire 3, who, as was disclosed in Wire 3, had previously been a source for the FBI from May of 2007 to May of 2008 (herein referred to as Person A). Jackson claims that it is unclear why the government did not attempt to utilize this source in the instant investigation. Jackson Mot. pg. 18, lines 23-24. In fact, Wire 3 sets forth with remarkable clarity why that source was not used:

> [Person A] was opened as a source by FBI for approximately one year from May 2007 to May 2008. [Person A] was closed, however, due to being unproductive. I have considered whether to approach [Person A] directly in an effort to further advance the instant investigation into the commission of the Target Offenses by the Target Subjects and Interceptees. I have decided not to do this, as [Person A] has not previously fully demonstrated a willingness as a source to actually provide information. Furthermore, as [Person A]'s conduct is the subject of the investigation into the ongoing Target Offenses in this Affidavit, it is too dangerous to the overall investigation to approach [Person A]at this time.

Wire 3 (Jackson Mot. Exhibit 18) at pg. 78, lines 18-25.

Jackson further suggests that the government ought to have made more use of an individual [herein referred to as Person B] who [redacted] and who previously wore a wire for the FBI "to meet with one of the identified Target Subjects and Interceptees in an unrelated matter." Jackson Mot. pg. 19. Jackson's own description, however, abundantly demonstrates why the FBI never used Person B to investigate Jackson and Yee: Person B's previous cooperation was *unrelated* to the instant matter. Jackson also overlooks another critical reason why Person B could not be used to advance the investigation into Jackson and Yee: [redacted]. It is even more unreasonable to suggest that the government should have pursued this

farfetched idea as an investigative technique before seeking a wiretap.

f. The Government Adequately Demonstrated For Necessity Purposes Why Keith Jackson Could Not Be Approached as a Confidential Witness

Jackson argues that the government "should have been required to show why it would be unable to obtain any and all of the information relayed on the telephone intercepts by simply asking Mr. Jackson questions." Jackson Mot. at pg. 18. In fact, the government *did* show why this investigative technique would not work. Specifically, the Wire 3 affidavit explains that

> I have also considered using the grand jury to secure the testimony of JACKSON, [redacted], who are at this time the only individuals of whom I am aware who may have sufficient knowledge of YEE and [redacted], and their potential associated criminal activities. However, I believe that it is reasonably likely that those individuals would invoke their Fifth Amendment testimonial privilege and refuse to testify. I believe it would be unwise to seek immunity for these individuals, because immunity would foreclose their prosecution, despite these being the most culpable members of this organization, outside of potentially [redacted] and Senator YEE. Additionally, based on my training and experience, I believe that the service of a grand jury subpoena upon the Target Subjects and Interceptees would only alert them to the existence of this investigation, causing them and others to become more cautious in their activities, flee to avoid further investigation and prosecution, or otherwise compromise the investigation.

Wire 3 Affidavit 85 lines 6-17. Subsequent wires contemplated approaching Jackson outside of the grand jury context as well, but concluded that it would be too risky to do so. *See, e.g.*, Wire 4 Affidavit at pg. 110 (stating that "JACKSON and other Target Subjects and Interceptees are not viable cooperating witnesses at this particular time given their roles in the overall conspiracies and the risk and danger to the undercover investigation from approaching them.")

If anything, Jackson's claim that UCEs and informants had "unimpeded access" to him reinforces why a wiretap was necessary in this case. UCEs first met Jackson in 2010, and the first discussion of campaign donations in excess of contribution limits occurred in May of 2011. By November of 2012, despite countless meetings and telephone calls with Jackson, the goals of the investigation were still unaccomplished. Specifically, the Wire 3 Affidavit explains that

> [W]hile both JACKSON and [redacted] repeatedly have reassured UCE 4773 that YEE and [redacted] are made aware of UCE 4773's "bundled" and conduit campaign contributions in excess of the $500 limits, and that they are grateful for them, those conversations with YEE and [redacted] do not occur in the presence of UCE 4773. This remains the case even though UCE 4773

> has been working as an undercover in this investigation for approximately one year.

Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 73, lines 24-28. Further on, the affidavit explains that

> [I]t is clear that JACKSON is a part of Senator YEE's inner circle of trust, and discusses a wide range of criminal activities with him. For example, as discussed in further detail above, JACKSON appears to frequently speak with Senator YEE about criminal activity related to the retirement of his debts and the accumulation of money, and providing consideration to UCE 4773 in exchange for payments to Senator YEE's campaign. JACKSON has repeatedly assured UCE 4773 that Senator YEE is aware of the nature of the manner of receiving the contributions because JACKSON has shared that with Senator YEE and that, therefore, Senator YEE has told JACKSON he is grateful to UCE 4773 and willing to provide official acts for UCE 4773..... Target Telephone 1 is JACKSON's primary telephone, and based on pen register data, JACKSON appears to use Target Telephone 1 to frequently communicate with the other Target Subjects and Interceptees. For example, during the September 21, 2011 meeting between UCE 4773, JACKSON, and Senator YEE, pen data shows that JACKSON used Target Telephone 1 to contact [redacted] and [redacted], an associate of JACKSON who has met with UCE 4773 on numerous occasions. Immediately after the October 11, 2011 meeting between UCE 4773 and JACKSON, during which UCE 4773 made an unlawful $5,000 contribution, JACKSON used Target Telephone 1 to contact [redacted] and [redacted]. Immediately following the December 10, 2011, dinner between UCE 4773 and JACKSON, during which they discussed redevelopment in San Francisco, JACKSON used Target Telephone 1 to contact [redacted] and CHOW. On March 1, 2012, before and after JACKSON called UCE 4773 to solicit $10,000 for Mayor LEE, he used Target Telephone 1 four times to contact [redacted]. On April 19, 2012, following a call from JACKSON to UCE 4773 to request $5,000 for Mayor LEE, followed by another $5,000 for Mayor LEE, JACKSON used Target Telephone 1 to contact [redacted]. Senator YEE uses Target Telephone 2 to communicate with JACKSON, [redacted], and others regarding his solicitations of illegal contributions and his efforts to repay those contributions with official action.
>
> In addition, on a number of occasions, pen data shows that shortly after UCE 4773 and JACKSON spoke over Target Telephone 1 about consideration UCE 4773 expected in exchange for any further contribution to Senator YEE, e.g., a letter of recommendation or a phone call to a state agency, there has been contact between Target Telephone 1 and Target Telephone 2, Senator YEE's telephone. That indicates that JACKSON and Senator YEE were discussing providing official acts in exchange for UCE 4773's money. However, it is necessary to intercept the actual conversations between JACKSON and Senator YEE to determine Senator YEE's knowledge of, and involvement in, criminal activity.

Id. at pgs. 74-75.

g. Shortcomings of Telephone Records, Trash Runs, Mail Covers, and Physical Surveillance

Jackson suggests that the government's description of the shortcomings of several investigative techniques was deficient. For example, Jackson suggests that the description in the Wire 3 affidavit of the analysis of telephone records "failed to state what information was gleaned from these techniques." Jackson Mot. pgs. 19-20. This is not true. The Wire 3 affidavit plainly explained that agents had obtained "multiple" pen registers and trap and trace devices on target subjects and interceptees, which revealed that there were "communications between Jackson, Yee, and the other Target Subjects and Interceptees." Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 81, lines 8-17. The Wire 3 affidavit also explained how cell site data had allowed agents to ascertain the approximate whereabouts of particular individuals. But, the affidavit also explained how pen registers and trap and trace devices did not reveal the content of particular communications. The affidavit provided a specific example of how telephone records had been used to show multiple telephone calls between Jackson, Yee, and Yee's chief of staff shortly after a call between UCE 4773 and Jackson, but because the content of those calls was unknown, Agent Quinn could only speculate about their significance. Wire 3 affidavit (Jackson Mot. Exhibit 18) at pg. 61, lines 7-19. This is precisely the kind of analysis that the Ninth Circuit called for in *United States v. Blackmon*, 273 F.3d 1204, 1210 (9th Cir. 2001).

Jackson's argument regarding the discussion of trash searches in Wire affidavit 3 is particularly specious. Agent Quinn set forth three specific examples of why trash runs were either not feasible, or had been attempted without any success. Of particular note, Agent Quinn explained that Yee shredded much of his trash, and that Jackson lived in a multi-unit building with numerous residents sharing trash facilities. Wire affidavit 3 (Jackson Mot. Exhibit 18) at pg. 82, lines 4-10.

Jackson further takes issue with the discussion in the Wire 3 affidavit regarding mail covers. Again, though, this section provided tangible, non-boilerplate examples of why mail covers had not worked to achieve all of the goals of the investigation. *Id.* at pg. 82. His suggestion that the government should have employed email search warrants is equally unfounded; Agent Quinn explained why he believed search warrants would be unproductive. Wire affidavit 3 (Jackson Mot. 18) at pgs. 85-86.

Finally, Jackson's perfunctory criticism of the physical surveillance section of Agent Quinn's Wire 3 affidavit is unconvincing. Jackson Mot. pg. 21. In particular, Agent Quinn described in great detail some of the limited successes that agents achieved using physical surveillance, such as following one of Yee's family members suspected of receiving illicit payments. Agent Quinn also explained how at least one interceptee wanted to conduct meetings with UCEs in private locations not amenable to physical surveillance, such as offices within San Francisco City Hall. Wire 3 affidavit (Jackson. Mot. Exhibit 18) at pg. 79.

h. Wiretaps Were Necessary To Progress The Investigation, Not To Replace UCE 4773

Jackson argues that the true reason the government sought a wire in November of 2012 was to replace UCE 4773, "its lead investigator, who was removed for misconduct" with a wiretap. Jackson Mot. at pg. 21. This is a particularly disingenuous argument for a number of reasons. First, it is abundantly clear from Wires 4-7 that the government did not, as Jackson intimates, replace UCE 4773 with a wiretap. Rather, as UCE 4773's role diminished, the government replaced UCE 4773 with other similarly-positioned UCEs and informants, including UCE 4180 and CHS #11. See, e.g., Wire 4 affidavit (Jackson Mot. Exhibit 19) at pg. 107 at lines 6-12 (describing how CHS #11 had taken on an increased role while internal FBI investigation into UCE 4773's program was pending); Wire 5 affidavit (Jackson Mot. Exhibit 20) at pg. 87, lines 23-24 ("The importance of CHS #11 has increased significantly as UCE 4773 was temporarily removed from the investigation due to FBI's ongoing program review"); *Id.* at pg. 90, lines 21-25 (describing how CHS #11 has worked to introduce UCE 3869 into the role that UCE 4773 had previously assumed); *Id.* at pg. 91, line 10 (noting that UCE 4599 had been used in a more substantial capacity since the withdrawal of UCE 4773). Second, for reasons discussed above, Jackson's attempts to attacks UCE 4773's credibility are without any factual basis.

i. The Government Complied with Minimization Requirements During the Wiretaps

As explained above, the Court authorized five separate 30-day periods during which the government was authorized to monitor electronic communications on telephones known to be used by Yee and/or Jackson. The first period ran from November 14, 2012 through December 13, 2012; the last

period ran from July 2, 2013 through July 31, 2013. Based on data reported in the government's Fifteen Day Reports submitted to the Court in conjunction with each of the five 30-day periods of wire interceptions, Yee and Jackson make generalized assertions that the government failed to properly minimize telephone conversations monitored pursuant to the Court's Title III authorization. Yee and Jackson interpret the data in the Fifteen Day Reports as showing that government agents monitoring the conversations on their telephone lines listened to a vast number of conversations that were not pertinent to the investigation authorized by the court. On that basis, Yee and Jackson argue that the government exceeded its authorization under the Court's Title III order and violated their Fourth Amendment rights, thus warranting suppression of all evidence obtained as a result of the wiretaps. Yee Mot. at pgs. 22-25; Jackson Mot. at pgs. 22-23.

The defendants' motions should be denied. First, their interpretation of the data in the Fifteen Day Reports is incorrect and their conclusions about what the data shows are simply wrong. Second, the courts have held that the proper way to evaluate the efforts of government agents to reduce their interception of conversations unrelated to the criminal activity under investigation is not by relying on statistics. Instead, the district court should examine the procedures actually employed by government agents when they monitored the conversations and any other electronic communications. The proper test is whether the government took reasonable measures to minimize the interception of conversations unrelated to the criminal investigation, while still pursuing its legitimate investigation. When the procedures employed by the government in the instant investigation are reviewed and measured by appropriate criteria, they demonstrate that the government acted reasonably and properly carried out the Court's Title III order. Further, even though statistics are not the benchmark for this analysis, when the relevant data about the surveillance is reviewed and interpreted correctly, it confirms the conclusion that the government monitors acted diligently to minimize listening to conversations unrelated to the activities under investigation.

1. The Minimization Procedures Employed By the Monitors Were Reasonable

The procedures utilized here were consistent with those the Ninth Circuit has found to demonstrate proper minimization. In *United States v. Rivera*, 527 F.3d 891, 904 (9th Cir. 2008) the

Ninth Circuit concluded that agents met the requirements of 18 U.S.C. § 2518(5). In doing so, the Court considered the presence of a number of factors, including: (1) all monitors were required to read the agent's wiretap affidavit, the court order authorizing the wiretap, and the minimization instructions; (2) the Assistant United States Attorney personally instructed the monitors on the first day of the wiretap; (3) each new monitor was required to read the affidavit, order, and instructions, and confirm by signing the documents; (4) the agent in charge of the monitoring had also been instructed on the minimization provisions; (5) the content of the minimization instructions themselves, which specified the procedures for minimizing and allowed the monitor to listen to a call "for a reasonable time, usually not more than two minutes," in order to determine if it was relevant; (6) the fact that all monitors were told that if they had questions, they could ask the on-site agent or could contact the AUSA or lead case agent, who were available at all times; (7) more seasoned agents were available to answer questions; (8) there was an overlap in shifts so that information could be shared; and (9) the monitors were instructed not to listen to privileged calls, including calls between spouses. *Rivera,* 527 F.3d at 904-905.

The Court's orders in the instant case authorizing the wiretaps listed the statutes under investigation and the names of the individuals who were "Target Subjects and Interceptees," and authorized, among other things, the monitoring of wire communications over specific phone lines. *See*, Orders Authorizing Interception of Wire Communications and Obtaining of GPS Location Information, Gov. Exhibits 15 through 19. The orders directed that: "… monitoring of wire communications must terminate immediately when it is determined that the communications are unrelated to communications subject to interception under 18 U.S.C. Chapter 119." *See e.g.*, Exh. 15, p. 9. Interception was to be terminated "unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature. If the communication is minimized, the monitoring agent shall spot check to ensure that the conversation has not turned to criminal matters." *Id.*, pp. 9-10.

All agents and staff assigned to monitor the Yee and Jackson telephone lines were required to read the agent affidavit which detailed the investigation; the Court's order authorizing the wiretap; and the minimization instructions prepared for each 30-day period. *See*, Declaration of Maya N. Clark in Support of United States' Consolidated Opposition to Leland Yee's and Keith Jackson's Motions to

Suppress Wiretap Evidence, or in the Alternative, Demand for *Franks* Hearing, (hereafter "Clark Dec."), Gov. Exhibit 20 at ¶ 4. At the beginning of each period, the FBI held a session during which an AUSA read the minimization instructions out loud to all agents and other personnel who would be involved in monitoring or assisting with the wiretap. *Id.* All attendees were required to sign the minimization instructions. *Id.* The reading was recorded on audio and any monitor who was not present for the reading was required to listen to the instructions before engaging in monitoring and sign a copy of the instructions. *Id.* A copy of the instructions, affidavit, and court order were also maintained in the wireroom at all times. *Id.* at ¶ 5.

Special Agent Clark, one of the case agents familiar with the investigation, was assigned as the Wireroom Administrative Agent responsible for operational logistics during the five 30-day sessions. Clark Dec., ¶ 4. Agent Clark was familiar with the Voicebox system used for monitoring the electronic communications, procedures for supervising the wireroom, and the minimization instructions. *Id.* at ¶ ¶ 2-4. She ensured that all monitors read the affidavit, order, and instructions, and made efforts to make sure that each monitor was familiar with the facts of the investigation. *Id.* at ¶ 4. Throughout each 30-day period, SA Clark was either present in the wireroom or available by phone to answer questions. *Id.* at ¶ ¶ 5, 11-12. She assisted monitors, fielded questions, and observed the operations of the monitors to ensure that proper monitoring and minimization procedures were being followed. *Id.* at ¶ 12.

The minimization instructions themselves provided correct guidance to the monitors for complying with the requirement that they make reasonable efforts not to listen to conversations unrelated to the illegal activity under investigation. *See*, United States' Instructions, Gov. Exhibits 21 through 25. The instructions stated: "Minimization requires that the agents make a good faith determination of whether any conversation is relevant to those illegal activities" authorized for investigation by the Court's order. *See e.g.* Gov. Exhibit 21 at ¶ 4. The instructions explained and directed that any conversation, or part of conversation, that was listened to (monitored), must be recorded. Similarly, if the conversation was not being monitored, it would not be recorded. *Id.* at ¶ 5. The instructions directed:

> You should listen to the beginning of each conversation for as long as, and only for as long as, it is necessary for you to determine if one of the

> persons named above is a participant and the conversation is pertinent to the subjects and activities targeted by the Court Order, but in any case, usually no longer than a few minutes unless the conversation is pertinent, that is, the conversation is within the scope of our authorization and not privileged. Title 18, United States Code, Section 2518(5) requires that interceptions be done 'in such a way as to minimize the interception of communications not otherwise subject to interception.' If you determine that the conversation is not a criminal conversation, or is privileged, stop monitoring and begin minimization. If you determine that the communication is pertinent, you will continue the interception."

Gov. Exhibit 21 at ¶ 9.

The instructions then directed the monitors: "If you determine during the initial few minutes that a conversation does not fall within the categories specified in the Order, that is, it is not pertinent, or that the conversation falls within one of the privileges discussed below, the recording and listening devices must be turned off." Gov. Exhibit 21 at ¶ 10. Finally, the instructions directed that it was possible that while the recording of a non-pertinent conversation was turned off, the conversation could turn to the matters under investigation. *Id.* at ¶ 11. Therefore, the monitor was permitted to spot monitor, that is, check the conversation by activating the monitoring and recording device in order to determine "if the nature of the conversation has changed so that it has become pertinent." *Id.* The monitor was directed to spot monitor only as long as necessary to determine if the conversation had become pertinent. *Id.* The instructions provided that spot monitoring could continue through the conversation. *Id. Also see*, Clark Dec. at ¶ 9.

These minimization instructions followed what was lawfully required. Further, by giving the monitors the flexibility to listen to a call for as long as it took to determine whether the call related to the activities under investigation, but usually no more than a few minutes, the instructions took into account the specific facts and circumstances of the investigation, which involved a number of target subjects and interceptees and a variety of offenses, including fraud, public corruption, money laundering, and drugs. "[W]hen the investigation is focusing on what is thought to be a widespread conspiracy more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise." *Scott,* 436 U.S. at 140. This is because "unlawful conspiracies do not always lay bare their plans in explicit

words." *McGuire*, 307 F.3d at 1201. Further, once monitoring started in this case, agents heard discussions about a wide range of subjects related to campaign fund-raising, and some of those activities were illegal or potentially illegal. Just two examples are conversations discussing what Yee called "the switcheroo," where he and a failed candidate for [redacted] appeared to be engaged in a scheme whereby Yee's maxed-out donors would be told to donate to that candidate and *vice versa*; and a scheme heretofore unknown to the government where Yee and Jackson conspired to extort campaign contributions from a member of the California State Athletic Commission in exchange for Yee's favorable vote on legislation affecting the Commission.

The minimization instructions also addressed how monitors were to deal with privileged communications, which required monitors to stop interception immediately. *See e.g.* Exh. 21, at ¶ 18; Clark Dec. at ¶ 10. Further, procedures were put in place so that calls to and from phone lines known to be associated with Yee's counsel and the woman believed to be Jackson's wife were automatically classified privileged and were not monitored. Clark Dec. at ¶ 19.

Information was posted in the wireroom providing the contact information for Special Agents Ethan Quinn and Jennifer Garlie, the two primary case agents at the time; Agent Clark; the agents' FBI supervisor; the relief supervisor; the Assistant Special Agent in Charge; District Counsel; Assistant District Counsel; the three AUSAs working on the case; and agents and staff who could provide technical support. Clark Dec. at ¶ 5. The information included telephone numbers at which all these individuals could be reached twenty-four hours a day / seven days a week. *Id.* At almost all times while the lines were being monitored during each period, one of the four case agents – each of whom was knowledgeable about the facts of the investigation -- was present in the wireroom. *Id.* at 11.

For each 30-day period, there were two shifts of monitors covering the hours from approximately 7:00 a.m. or 8:00 a.m. to 10:00 p.m. or 11:00 p.m. Clark Dec. at 6. Sometimes the shifts overlapped, but even when they did not, it was not uncommon for monitors from the first shift to stay long enough to brief second-shift monitors on relevant developments. *Id.*

In sum, the procedures implemented for monitoring Yee's and Jackson's phone lines and minimizing the monitoring of conversations unrelated to the activities under investigation met the

requirements set out by the Ninth Circuit in *Rivera* and *Torres*, 908 F.2d at 1423, and were reasonable in light of the circumstances of the investigation.

2. Accurate Interpretation of Data Regarding the Number of Minimized Conversations Confirms That the Government Engaged in Reasonable Efforts to Avoid Listening To Conversations Unrelated to the Criminal Activity Under Investigation

Using information in the Fifteen Day Report the government prepared for the Court during each 30-day surveillance period, Yee and Jackson deduce that (1) of the calls monitored by the government, a vast number were unrelated to the investigation, and (2) of that vast number, the government minimized only a small portion. Yee and Jackson thus conclude that the government failed to fulfill its duty to avoid listening to conversations unrelated to illegal activity. For instance, Jackson asserts the Reports show that for the relevant periods, the government listened to 8,000 of his calls and only 16% were deemed pertinent, or related to the investigation, and 84% were unrelated to the investigation. He also asserts that the government only minimized 6% of all the calls it listened to. *See*, Jackson's Motion to Suppress Wiretap Evidence, at 23.[6] Yee draws similar conclusions from his interpretation of the information in the Fifteen Day Reports. He claims the Reports show that 91% of the conversations monitored on Yee's lines were unrelated to the investigation, and the government minimized only 10% of the calls it listened to. *See*, Yee's Motion to Suppress Wiretap Evidence, at 21-22. Yee also asserts that "a staggering 80 percent of the calls that the government itself characterized as non-pertinent were not minimized." *Id.* at 22. (The government notes that while it can see how Yee arrived at the 91% figure, it has not been able to determine how Yee came up with the latter 80% figure.[7])

Jackson's and Yee's conclusions are simply wrong. In coming to those conclusions, they misunderstand the data in the Fifteen Day Reports and make faulty assumptions. First, they incorrectly

[6] The Fifteen Day Reports are included in Yee's Exhibits at Exhibits H – L.

[7] There are other issues with Yee's analysis. First, he incorrectly claims that during the fifteen days covered by the April 2013 report for telephone line 3, there were no minimized calls. *See*, Yee Motion at 22. In fact, the Fifteen Day report shows there were eighteen minimized calls. Yee Exh. J at p. 18. Further, Yee's math is incorrect. On page 21 of his motion, Yee states that the Reports show that the government intercepted 6,929 of his calls. However, the figures in his chart for total intercepted calls (which are correct) add up to 6,608, not 6,929.

assume that the entry on the Fifteen Day Reports designated "Total Number of Wire Intercepts" means the total number of calls that were actually monitored / listened to.[8] This is not the case. The Voicebox system has specific nomenclature for certain data, and in this instance "total number of wire intercepts" means *all* activity detected on a particular phone line for the applicable time period. Clark Dec. at ¶ 16. That includes incoming and outgoing calls during which conversations took place, but it includes more than that. *Id.* It includes missed calls, *i.e.* calls where the phone rang, but there was no answer, and no connection was made to an answering machine; calls where voice mails were left; alerts signaling that the voice mailbox was full; text messages; and calls where there was a technical problem with the phone line and there was no audio and no content. *Id.* The term includes activity and conversations that were not monitored because there was no monitor assigned to the line at that time. *Id.* The term also includes conversations that were privileged and not monitored. *Id.* Thus, the number of conversations that were monitored / listened to is less than the figure for "total number of wire intercepts" section in the Fifteen Day Report.

Second, the defendants incorrectly assume that if they simply subtract the number of calls categorized as "pertinent" from the "total number of wire intercepts," the resulting figure is the number of calls listened to and determined to be unrelated to the investigation. The entries in the Fifteen Day Reports designated "Number of Intercepts Flagged as Pertinent" encompass all telephone conversations that were monitored, reviewed, and ultimately classified by the reviewing agents as pertinent. Clark Dec. at ¶ 17. However, as explained above, not all intercepts were monitored. Therefore, it is incorrect to assume that the difference between "total number of intercepts" and the "number of intercepts flagged as pertinent" yields the number of calls listened to and classified as non-pertinent. *Id.* Accordingly, both Jackson's and Yee's conclusions about the number of monitored conversations that were determined to be unrelated to the investigation is incorrect.[9]

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[8] The data that appears in the Fifteen Day Reports is information that the agents obtained by making queries of the Voicebox system employing certain filters and parameters. That information was passed on to the AUSA for inclusion in the Fifteen Day Reports. Clark Dec. at ¶ 15.

[9] Limitations in the Voicebox software and search capabilities limit the ability to search for reliable statistics showing all calls that were monitored and classified by an agent as non-pertinent. *See*, Declaration of James A. Folger in Support of United States' Consolidated Opposition to Leland Yee's and Keith Jackson's Motions to Suppress Wiretap (hereafter "Folger Dec."), Exh. 26, ¶ 15.

Third, Yee and Jackson appear to assume that minimization occurred only on conversations that were classified as non-pertinent. This is also incorrect. In this context, "minimization," and "number of minimized intercepts" as used in the Fifteen Day reports, mean all telephone conversations that were monitored and at least at one point during the call, the monitor elected to minimize the call. Clark Dec. at ¶ 18. In other words, the monitor stopped listening and caused the system to stop recording. This minimization procedure could take place during calls that were ultimately classified as either pertinent or non-pertinent. *Id.* at ¶ 14.

Thus, the information in the Fifteen Day Reports does not support Jackson's and Yee's assertions that a large percentage of their conversations were unrelated to the investigation and the government failed to minimize when it should have. To the contrary, when the information in the Reports is interpreted correctly and supplemented with additional data obtained through the Voicebox system, it becomes apparent that monitors reasonably utilized the minimization process in this case.

It is worth clarifying at this point that "pertinent" and "non-pertinent" are not terms used in the Title III statute, nor was classifying calls as pertinent or non-pertinent required by the Court's wiretap orders. The Voicebox system provided the case agents the ability to use this classification feature as a means of organizing evidence for later review by agents, prosecutors, and defense counsel. Clark Dec. at ¶ 13. The agents took advantage of this feature and for each conversation monitored, a case agent reviewed the call and classified it as pertinent or non-pertinent to the investigation, or privileged. *Id.* This was a means of focusing on the conversations and other communications that were believed to have some potential evidentiary value, and setting aside the rest. Further, it is important to understand that while all calls that were ultimately classified as pertinent were listened to, the same is not true of all calls ultimately classified as non-pertinent. The latter classification included activity that was not monitored, for instance, calls that came in when there was no monitor present to listen. Folger Dec., Exh. 26, at ¶ 21.

In order to assist the Court and the defendants in understanding how the minimization process worked in this case, SA James Folger, one of the case agents, recently ran searches of the Voicebox system using specified parameters and filters. The results appear in the charts titled "Keith Jackson

Wiretaps" and "Leland Yee Wiretaps," filed separately as Gov. Exhibits 27 and 28. In his Declaration, SA Folger explains the entries in the chart. Exh. 26, at ¶ ¶ 6-21.

Both charts follow the same pattern. The three entries labeled "Total Number of Intercepted Calls," "Pertinent Calls," and "Minimized Calls," track the same data that Yee and Jackson pulled from the Fifteen Day Reports and include in their motions as the basis for their conclusions.[10] As explained above, "intercepted calls" does not mean all monitored conversations. *Also see*, Folger Dec., at ¶ 7. For instance, for the first period of surveillance on Jackson's phone, the total number of monitored conversations is something less than 1,897. *See*, Gov. Exhibit 27. At the very least, one would have to deduct the number of SMS messages (texts), privileged calls, and calls with no audio/content. Referring to the information on the first column of SA Folger's chart, the total interceptions in those three categories add up to 832. *Id.* When those 832 interceptions are subtracted from the total of 1,897, that leaves 1,074 interceptions. At most, then, 1,074 conversations were monitored. However, due to other variables, even this is not a certain figure for all monitored conversations.

More important is the analysis in the bottom two-thirds of each chart, which addresses all calls (conversations and text messages) that were longer than two minutes in length. This is critical because it is not necessary or practical to minimize short calls, and the courts have adopted this view. *See e.g., United States v. Homick*, 964 F.2d 899, 903 (9th Cir. 1992)("Because many telephone calls are brief in duration, a listener frequently cannot determine a particular call's relevance to the investigation before the call is completed."); *United States v. Dumes*, 313 F.3d 372, 380 (7th Cir. 2002)("We certainly agree that minimization of short calls is not required."); United States v. Capra, 501 F.2d 267, 275-76 (2d Cir. 1974)(calls lasting less than two minutes need not be minimized). As reflected in SA Folger's charts, the vast majority of calls on Yee's and Jackson's phones were shorter than two minutes. *See*, Gov. Exhibits 27 and 28 (compare "Calls Longer Than Two Minutes" with "Total Number of Intercepted Calls"). That alone explains why the total number of minimized calls for each session was not large.

Taking the analysis a step further, the data on the Folger charts undermines Yee's and Jackson's

[10] At Paragraph 6 of his Declaration, SA Folger explains some minor discrepancies that are not material to the present issues. *See*, Exh. 26.

claim that the government completely ignored its duty to take reasonable steps to minimize, or reduce the interception of calls determined to be non-pertinent, or unrelated to the investigation. In order to properly address that claim, one must focus on calls longer than the several minutes it took to determine whether a call was pertinent or non-pertinent. For purposes of the present argument, the Folger analysis uses the two-minute mark, but it could have been longer in this case given the complexity of the matters under investigation. For both Jackson and Yee, the figures highlighted in yellow in the Folger charts are instructive. For instance, in the first period of interception on Jackson's phone, monitors minimized 38.86% of calls longer than two minutes. Gov. Exhibit 27. That is not an insignificant percentage. Further refining the analysis, monitors minimized 69.14% of calls longer than two minutes that were ultimately determined to be non-pertinent. *Id.* For all of the Jackson interceptions, monitors minimized 42.94% of such calls. *Id.* There are similar results for the data on the Yee interceptions. Gov. Exhibit 28. For all of the Yee interceptions, monitors minimized 41.92% of calls longer than two minutes that were ultimately determined to be non-pertinent.

Again, these are not insignificant figures. They demonstrate that monitors were actively engaging in minimization and were doing so at a rate that was reasonable in light of the specific circumstances of the instant investigation, which involved a wide range of relatively complex illegal activities.

Yee's citation to session 2101, a call to Yee by a friend on December 4, 2012, as an example of the government's failure to minimize non-pertinent calls is unpersuasive. In fact, the informal transcript of the call, or linesheet, a full copy of which is provided in the United States' exhibits at Gov. Exhibit 29, shows that the monitors minimized the call six separate times during the call. *See*, Gov. Exhibit 29, at US-808382, chart at end of call labeled "Minimization Event." In other words, the monitor listened, minimized, spot-checked, minimized, etc. throughout the call. At one point when the monitor spot-checked, Yee and the friend were talking about the fact that Yee was running for Secretary of State and raising campaign funds. *Id.* at US-808380 – US-808381. That conversation was related to the matters under investigation. When the conversation turned away from that topic and became more personal, the monitor minimized again. *Id.* at US-808382.

Session 3295, a call on April 7, 2013 by Yee to an unidentified female while Yee was at the airport, is similarly unhelpful to Yee's argument. The linesheets for that call and the relevant follow-up calls are provided in the United States' exhibits at Exhibit 30. The first call, session 3295, lasted approximately seven minutes. *See*, Exh. 30, page US-808785, time stamps. The monitor listening to call 3295 reasonably did not minimize the call because the call started with the woman talking about Yee's help in connection with a liquor license she was trying to obtain. She explained difficulties and Yee responded, "so it's a good thing that I didn't touch anything, huh?" *Id.* at US-808785. The woman said "…I am talking about the liquor license. No, it is not good that you didn't touch it." *Id.* In light of the fact that in connection with this and the preceding wiretaps, the government was investigating potential corruption by Yee, especially in relation to his performance of official acts in exchange for money, it was reasonable to listen to and not minimize this part of the conversation. The same holds true for the next part of the conversation, where it is difficult to understand what Yee and the woman were discussing. *Id.* at US-808786. Then the conversation turned to Yee's run for Secretary of State and fund-raising and the call ended shortly thereafter. *Id.* at US-808786 – US-808787. Those topics clearly fell within the parameters of the investigation and it was reasonable not to minimize. The two calls between Yee and the woman that followed immediately after were also monitored reasonably. Call 3296, which took place within minutes of the previous call, only lasted one minute and was not minimized because it was so short. *Id.* at US-808787. The next call, session 3297, two hours later, was approximately four minutes in length and was minimized two minutes in (at 09:03:31), was spot-checked, and then minimized again at 09:04:24. *Id.* at US-808788. This procedure confirms the reasonableness of the monitor's actions and the fact that minimization was taking place when it should.

Finally, Yee's argument that the majority of calls designated by the government as "pertinent" had nothing to do with the investigation is untenable. In support of this claim, Yee asserts that the majority of the calls labeled pertinent by the government intercepted during the first session dealt with non-pertinent subjects such as fund-raising, campaign donations, and initiation of Yee's run for Secretary of State. *See*, Yee Motion, at p 24. In arguing that these topics had nothing to do with the Target Offense cited in the Court's order authorizing the wiretap, Yee completely ignores the fact that

honest services fraud (18 U.S.C. § 1346) was included in the Court's Orders and the Affidavits that formed the basis for the Court's order dealt extensively with evidence of Yee's and Jackson's schemes to exchange official acts for donations to Yee's campaigns. *See e.g.*, Exh. 15, at p. 2.

In any event, contrary to Yee's and Jackson's assertions, the Ninth Circuit has not expressly held that suppression of all the fruits of a wiretap is required when the government has failed to fulfill its duty to minimize. In *United States v. Cox*, 462 F.2d 1293, 1299-1302 (9th Cir. 1972), the Ninth Circuit rejected the defendants' argument that claim that the government failed to properly minimize the interception of telephone conversations. In so holding, the Court stated: ""Furthermore, even if the surveillance in this case did reflect a failure to minimize, it would not follow that Congress intended that as a consequence all the evidence obtained should be suppressed." *Id.* at 1301. Referring to the Title III provisions, the Court added: "Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations." *Id.* Thus, while the intercepted conversations beyond the scope of the court's surveillance authorization could be suppressed, those "the warrant contemplated overhearing would be admitted." *Id.* Accordingly, suppression of all wiretap evidence for failure to minimize is far from a foregone conclusion, and the Ninth Circuit cases cited by Yee and Jackson do not hold otherwise. Specifically, *United States v. Scully*, 546 F.2d 255, 262 (9th Cir. 1976), *vacated on other grounds, U.S. v. Cabral*, 430 U.S. 902 (1977), relied upon by Yee, expresses a view of the appropriate remedy. However, that statement was dicta, was not essential to the issue being decided, did nothing to undermine *Cox*. Similarly, in *United States v. Turner*, 528 F.2d 143, 156 (9th Cir. 1975), cited by Jackson, the Court merely described the different positions of the parties as to the correct remedy. The Court specifically stated that it did not need to reach that issue because it found that the government complied with the minimization requirement. *Id.*

In sum, in connection with the Yee and Jackson wiretaps, the government adopted reasonable measures to reduce to a practical minimum the interception of conversations unrelated to the criminal activity under investigation, while still going about the investigation authorized by the Court. Contrary to the assertions of the defendants, the statistics relating to the minimization procedures confirm the

reasonableness of the government's efforts. As such, the government has met its burden of establishing a *prima facie* case of compliance with the minimization requirement and Yee's and Jackson's motions to suppress all intercepts should be denied.

V. CONCLUSION

When Jackson's and Yee's attacks on the wiretaps are taken apart and analyzed carefully, it becomes clear that there are many allegations, but no substance. The wiretap applications in this case were detailed and dense for a very good reason: the government wanted to the Court to know all the facts, whether favorable, unfavorable, or neutral, so that the Court could make a fully informed decision as to probable cause and necessity. Further, the government did not want any evidence obtained through the wiretaps to be suppressed down the line. Accordingly, and as amply demonstrated above, the agents who provided affidavits to the Court were thorough and accurate. Despite Jackson's attempts to suggest otherwise, the original Quinn Affidavit and those that followed contained no material misstatements or omissions. There are no material matters at issue and as such, Jackson has failed entirely in meeting the burden required for an evidentiary hearing under *Franks*.

Given the overwhelming evidence reported in the wiretap applications establishing probable cause to believe that the target offenses, including honest services fraud, were being committed, Jackson's and Yee's attempts to suppress the wiretap evidence for lack of probable cause also fail.

Similarly, as discussed in detail above, the government more than met the requirements of necessity in obtaining the wiretaps.

Finally, in establishing and carrying out reasonable procedures to minimize the interception of conversations and other communications unrelated to the illegal activities under investigation, as confirmed by the record of active minimization in which the monitors engaged, the government fully complied with the Court's minimization requirements.

For all these reasons, Yee's and Jackson's motions to suppress the evidence obtained as the

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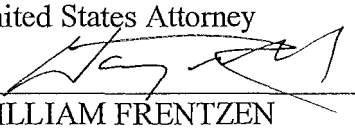
result of the wiretaps should be denied.

Very truly yours,

MELINDA HAAG
United States Attorney



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